United States Court of Appeals

for the Second Circuit

APPENDIX

75-4116

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and W. J. USERY, JR., Secretary of Labor,

Respondents,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC and Its LOCAL No. 301,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

B

P/s

JOINT APPENDIX

DAVID L. BENETAR, Esq.
ARANOW, BRODSKY, BOHLINGER, BENETAR & EINHORN
Attorneys for Petitioner
469 Fifth Avenue
New York, New York 10017
(212) 889-1470

Of Counsel:

ROLAND C. RADICE, Esq.
General Electric Company
One River Road
Schenectady, N. Y. 12345
(518) 385-4141

WILLIAM J. KILBERG, Esq.
Solicitor of Labor
Attorney for Respondent Secretary of Labor
U. S. Department of Labor
Washington, D. C. 20210
(202) 523-6818

ALLEN SACHSEL, Esq.
U. S. Department of Justice
Civil Division
Appellate Section
Attorney for Respondent Occupational Safety and Health Review Commission
10th and Pennsylvania Avenue, N.W.
Washington, D. C. 20530
(202) 739-3688

WINN NEWMAN, Esq.
International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and Its Local No. 301
Attorney for Intervenors
1126 16th Street, N.W.
Washington, D. C. 20036
(202) 296-1200

UNITED STATES COURT OF APPEALS
FILED
APR 26 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

5

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
Certified List of the Occupational Safety and Health Review Commission	1a
Amendment to Certified List	7a
Secretary's Citation for a Serious Repeated Violation, dated April 13, 1973	8a
Secretary's Citation for a Willful Serious Violation, dated April 13, 1973	12a
Employer's Notice of Contest, dated April 17, 1973	21a
Secretary's Complaint, dated May 4, 1973	23a
Employer's Answer, dated May 22, 1973	34a
Stenographic Transcripts of Testimony Taken Before Administrative Law Judge Charles K. Chaplin on June 19, 20, 21, 25, 26 and 27, 1973	41a

TESTIMONY ON JUNE 19, 20 AND 21

Witnesses for Complainant:

John Nead	
Direct	41a
Cross	60a
Redirect	75a

PAGE

Larry Rafferty
Direct 86a
By the Court 118a
Cross 119a
By the Court 144a

Gary Kingsland
Direct 145a

John Keast
Cross 149a
Recross 152a

David Bernard
Direct 153a
Cross 187a
By the Court 215a
Redirect 217a
Recross 218a

TESTIMONY ON JUNE 25, 26 AND 27

Witness for Intervenors:

Larry Rafferty
By the Court 219a
Redirect 221a

Witnesses for Respondent:

Leland Weller
Direct 222a
Cross 227a

PAGE

Bruce Frederick Henkel
Direct 234a
Cross 236a
By the Court 244a

Gordon Richardson
Direct 245a
Cross 249a

Robert A. Bloomer
Direct 251a
Cross 255a
Recross 257a

EXHIBITS TO TRANSCRIPT

Complainant's Exhibit 1 ..... 259a
Complainant's Exhibit 2 ..... 264a
Complainant's Exhibit 3 ..... 265a
Complainant's Exhibit 4 ..... 266a
Respondent's Exhibit 8 ..... 269a

Administrative Law Judge's Decision and Order, dated November 19, 1973 ..... 270a

Commission's Decision, dated April 21, 1975 ..... 344a

Petition for Review 411a

Certified List of the Occupational Safety and Health Review Commission

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY, Petitioner,	)	
v.	)	No. 75-4116
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Respondent.	)	

CERTIFIED LIST OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

The Occupational Safety and Health Review Commission, by its Executive Secretary, certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Commission and known upon its records as OSAHRC Docket No. 2739. This transcript includes the pleadings and transcript and testimony upon which the order of the Commission in said proceeding was entered, and includes also the findings and order of the Commission.

VOLUME I Exhibits introduced into evidence:

Employer's (Respondent's) Exhibits R-1 and T-3 thru R-9

Secretary's (Complainant's) Exhibits C-1 thru C-31

Joint Exhibits J-1 thru J-3

Union's Exhibits P-1 thru P-4

		CERTIFIED RECORD
VOLUME II	Stenographic transcripts of testimony taken before Administrative Law Judge Charles K. Chaplin on June 19, 20, 21, 25, 26 and 27, 1973 ----------	1-1077

VOLUME III -- Pleadings

1.	Copy of Secretary's Citation for Serious Violation, dated April 13, 1973 ----------	1-6
2.	Copy of Secretary's Citation, dated April 13, 1973 ----------	1-4
3.	Copy of Secretary's Citation for Repeated Violation, dated April 13, 1973 ----------	1
4.	Copy of Secretary's Citation for a Serious Repeated Violation, dated April 13, 1973 ----------	1

5. Copy of Secretary's Citation for a Willful Serious Violation, dated April 13, 1973 ---------- 1

6. Copy of Secretary's Notification of Proposed Penalty, dated April 13, 1973 ---------- 1-3

7. Copy of Employer's Notice of Contest, dated April 17, 1973 ---- 1-2

8. Copy of Authorized Representative of Employees' Request for Expedited Proceedings, dated April 24, 1973 ---------- 1

9. Copy of Employer's Response to Request for Expedited Proceedings, dated April 26, 1973 ---------- 1-3

10. Copy of Secretary's Response to Request for Expedited Proceedings, dated April 30, 1973 ---------- 1

11. Copy of Commission's Ruling on Request for Expedited Proceedings, dated May 1, 1973 ---------- 1

12. Copy of Secretary's Complaint, dated May 4, 1973 ---------- 1-12

13. Copy of Administrative Law Judge's Notice of time, date and location of Hearing, dated May 10, 1973 ---------- 1

14. Copy of Administrative Law Judge's Notice of time, date and location of Rescheduled Hearing, dated May 14, 1973 ------- 1

15. Copy of Employer's Answer, dated May 22, 1973 ---------- 1-6

16. Copy of Secretary's Motion to Amend Complaint, dated June 7, 1973 ---------- 1-2

17. Copy of Secretary's Opposition to Postponement of Hearing, dated June 7, 1973 ---------- 1-2

18. Copy of Employer's Request for Postponement of Hearing, dated June 8, 1973 ---------- 1-4

19. Copy of Administrative Law Judge's Order on Employer's Motion for Continuance, dated June 8, 1973 ---------- 1-2

20. Copy of Employer's Post Hearing Brief, dated August 13, 1973 ---------- 1-63

21. Copy of Authorized Representative of Employees' Brief, dated August 17, 1973 ---------- 1-124

22. Copy of Employer's Reply Brief, dated September 12, 1973 ------ 1-28

23. Copy of Authorized Representative of Employees' Reply Brief, dated September 12, 1973 ---------- 1-22

24. Copy of Secretary's Reply Brief, received September 17, 1973 ---------- 1-95

25. Copy of Administrative Law Judge's Decision and Order, dated November 19, 1973 ---------- 1-74

26. Copy of Chairman Moran's Direction for Review, dated December 10, 1973 ---------- 1

27.	Copy of Authorized Representative of Employees' Petition for Discretionary Review, dated December 14, 1973 ----------	1-9
28.	Copy of Secretary's Petition for Discretionary Review, dated December 14, 1973 ----------	1-7
29.	Copy of Commissioner Van Namee's Additional Issues to Direction for Review, dated December 20, 1973 ----------	1
30.	Copy of Employer's Brief, dated February 15, 1974 ----------	1-25
31.	Copy of Secretary's Brief, dated February 21, 1974 ----------	1-52
32.	Copy of Health Research Group's Brief Amicus Curiae, dated March 11, 1974 ----------	1-55
33.	Copy of Commission's Decision, dated April 21, 1975 ----------	1-66
34.	Copy of Employer's Motion for Stay, dated May 19, 1975 --------	1-3
35.	Copy of Commission's Order on Motion for Stay, dated June 26, 1975 ----------	1

IN TESTIMONY WHEREOF, the Executive Secretary of the Occupational Safety and Health Review Commission, being duly authorized by the Occupational Safety and Health Review Commission, has hereunto set his hand and affixed the seal of the Occupational Safety and Health Review Commission in the City of Washington, District of Columbia, this 24th day of July 1975.

William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission

(SEAL)

Occupational Safety and Health Review Commission

COURT NO. 75-4116

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of
GENERAL ELECTRIC COMPANY
OSAHRC Docket No. 2739

4/13/73	Secretary's Citation for Serious Violation, dated
4/13/73	Secretary's Citation, dated
4/13/73	Secretary's Citation for Repeated Violation, dated
4/13/73	Secretary's Citation for a Serious Repeated Violation, dated
4/13/73	Secretary's Citation for a Willful Serious Violation, dated
4/13/73	Secretary's Notification of Proposed Penalty, dated
4/17/73	Employer's Notice of Contest, dated
4/24/73	Authorized Representative of Employees' Request for Expedited Proceedings, dated
4/26/73	Employer's Response to Request for Expedited Proceedings, dated
4/30/73	Secretary's Response to Request for Expedited Proceedings, dated
5/1/73	Commission's Ruling on Request for Expedited Proceedings, dated
5/4/73	Secretary's Complaint, dated
5/10/73	Administrative Law Judge's Notice of time, date and location of Hearing, dated
5/14/73	Administrative Law Judge's Notice of time, date and location of Rescheduled Hearing, dated
5/22/73	Employer's Answer, dated
6/7/73	Secretary's Motion to Amend Complaint, dated
6/7/73	Secretary's Opposition to Postponement of Hearing, dated
6/8/73	Employer's Request for Postponement of Hearing, dated
6/8/73	Administrative Law Judge's Order on Employer's Motion for Continuance, dated
6/19/73	Hearing Opened
6/19/73	Hearing Closed
6/20/73	Hearing Opened
6/20/73	Hearing Closed
6/21/73	Hearing Opened
6/21/73	Hearing Closed
6/25/73	Hearing Opened
6/25/73	Hearing Closed
6/26/73	Hearing Opened
6/26/73	Hearing Closed

6/27/73	Hearing Opened
6/27/73	Hearing Closed
8/13/73	Employer's Post Hearing Brief, dated
8/17/73	Authorized Representative of Employees' Brief, dated
9/12/73	Employer's Reply Brief, dated
9/12/73	Authorized Representative of Employees' Reply Brief, dated
9/17/73	Secretary's Reply Brief, received
11/19/73	Administrative Law Judge's Decision and Order, dated
12/10/73	Chairman Moran's Direction for Review, dated
12/14/73	Authorized Representative of Employees' Petition for Discretionary Review, dated
12/14/73	Secretary's Petition for Discretionary Review, dated
12/20/73	Commissioner Van Namee's Additional Issues to Direction for Review, dated
2/15/74	Employer's Brief, dated
2/21/74	Secretary's Brief, dated
3/11/74	Health Research Group's Brief Amicus Curiae, dated
4/21/75	Commission's Decision, dated
5/19/75	Employer's Motion for Stay, dated
6/26/75	Commission's Order on Motion for Stay, dated

Occupational Safety and Health Review Commission

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY, Petitioner,	)	
v.	)	No. 75-4116
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Commission's certified list and chronological list of relevant docket entries in the above-captioned case has this day been served by mail upon the following parties at the addresses listed below:

Michael I. Bernstein, Esquire (Counsel for Petitioner)
Aranow, Brodsky, Bohlinger,
Benetar & Einhorn
469 Fifth Avenue
New York, New York 10017

Roland C. Radice, Counsel
General Electric Company
One River Road
Schenectady, New York 12305

Michael H. Levin, Esquire
U. S. Department of Labor, Rm. S4004
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Boren Chertkov, Esquire
I.U.E., Radio & Machine Workers,
AFL-CIO, CLC Local #301
1126 - 16th Street, N. W.
Washington, D. C. 20036

Bertram Robert Cottine and
Stephen Early, Repres. of
Health Research Group
2000 P Street, N. W., Suite 708
Washington, D. C. 20036

Francis V. LaRuffa, Esquire
Regional Solicitor, USDOL
1515 Broadway, Rm. 3555
New York, New York 10036

William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission

Dated at Washington, D. C.

this 24th day of July 1975.

Amendment to Certified List

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY, Petitioner,	)	
v.	)	No. 75-4116
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Respondent.	)	

AMENDMENT TO CERTIFIED LIST

Omitted from original Certified List filed with the Court on July 24, 1975 was notation of:

Copy of Authorized Representative of Employees' Brief, dated February 19, 1974 ---------- 1-31
(Document included in Authorized Representatives of Employees' Brief, dated August 17, 1973, filed with original list.)

William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission

8a

Secretary's Citation for a Serious Repeated Violation, dated April 13, 1973

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

RECEIVED
APR 1973
DENVER

CSHO NO.	OSHA-1 NO.
N-2767	46
AREA	REGION
6010	2

CITATION COVER LETTER

TO: Mr. Donald Craig
Vice President and General Manager
General Electric Company
1 River Road
Schenectady, New York 12345

Date April 13, 1973

Subject: Citation for Alleged Occupational Safety and Health Violation(s)

An inspection of a workplace under your operation, ownership, or control has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651. The nature of such alleged violation(s) is described in the enclosed citation with references to applicable standards, rules, regulations, and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act.

If you contest the citation you may post a notice to this effect near the citation contested. The Act contains penalties for violation of the posting requirements.

You will soon be notified by certified mail whether or not a proposed penalty will be assessed as a result of the cited violation(s). You have the right to contest the citation(s), the proposed penalties, or both, before the Occupational Safety and Health Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties. If you do contest, you must so notify the Area Director within 15 working days after receipt of the certified mail notice regarding proposed penalties. If you fail to contest within the 15 working day period, the citation and the proposed assessment of penalties shall be deemed to be a final order not subject to review by any court or agency.

An employee or representative of employees may file a notice to contest the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. Failure to correct an alleged violation within the abatement period may result in a further proposed assessment of penalties.

As to alleged violations with an abatement period of 30 days or less, you are directed to promptly advise the Area Director as to the specific corrective action on each such violation and the date of such action.

Alleged violations having a longer abatement period will require a progress report at the end of each 30-day period. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director shall be so advised.

A followup inspection may be made for the purpose of ascertaining that you have posted the citations as required by the Act and corrected the alleged violations as you have reported. The Act provides that whoever knowingly gives false information is subject to a fine up to $10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address listed above.

U.S. Department of Labor
By Area Director
Chester C. Whiteside
Acting

Form OSHA - 2C
Aug. 1971

9a

Secretary's Citation for a Serious Repeated Violation

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

RECEIVED

CSHO NO.	OSHA-1 NO.
N-2767	46
AREA	REGION
6010	2

OSHA-2A — CITATION FOR A SERIOUS REPEATED VIOLATION

Citation Number 1 of 1 — Date Issued April 13, 1973

EMPLOYER General Electric Company

ADDRESS (Street 1 River Road

(City Schenectady — State New York — Zip 12345

An inspection of a workplace under your ownership, operation, or control located at above address and described as follows Building 4273 has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 CFR 1910.133(a)(1) Page 22231	Failure to provide suitable eye protection for two employees, Bay K-13, using a jack hammer to break up concrete.	Immediately upon receipt of this citation.

Area Director's Signature — Chester C. Whiteside, Acting

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

ONLY COPY AVAILABLE

10a

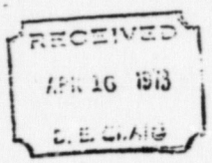
Secretary's Citation for a Serious Repeated Violation

U.S. DEPARTMENT OF LABOR Occupational Safety and Health Administration	CSHO NO. N-2767	OSHA-1 NO. 46
	AREA 6010	REGION 2

NOTIFICATION OF PROPOSED PENALTY

FOR REPEATED VIOLATIONS

TO: Mr. Donald Craig
Vice President and General Manager
General Electric Company
1 River Road
Schenectady, New York 12345



On the 13th day of April, 1973, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.	Proposed Penalty
1	$2,000.00

OTHER VIOLATIONS*

Citation No.	Item No.	Proposed Penalty
1	1.	$ 500.00
	2.	100.00
	3.	1,000.00

Total for All Alleged Violations $3,600.00

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse side)

Secretary's Citation for a Serious Repeated Violation

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at Syracuse, New York this 13th day of April, 1973.

Acting
Area Director
Occupational Safety and Health Administration
U. S. Department of Labor
203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

GPO 913-4-5

12a

Secretary's Citation for a Willful Serious Violation, dated April 13, 1973

RECEIVED
APR 13 1973
U.S. DEPT. OF LABOR

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	OSHA-1 NO.
N-2767	46
AREA	REGION
6010	2

CITATION COVER LETTER

TO: Mr. Donald Craig
Vice President and General Manager
General Electric Company
1 River Road
Schenectady, New York 12345

Date April 13, 1973

Subject: Citation for Alleged Occupational Safety and Health Violation(s)

An inspection of a workplace under your operation, ownership, or control has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651. The nature of such alleged violation(s) is described in the enclosed citation with references to applicable standards, rules, regulations, and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act.

If you contest the citation you may post a notice to this effect near the citation contested. The Act contains penalties for violation of the posting requirements.

You will soon be notified by certified mail whether or not a proposed penalty will be assessed as a result of the cited violation(s). You have the right to contest the citation(s), the proposed penalties, or both, before the Occupational Safety and Health Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties. If you do contest, you must so notify the Area Director within 15 working days after receipt of the certified mail notice regarding proposed penalties. If you fail to contest within the 15 working day period, the citation and the proposed assessment of penalties shall be deemed to be a final order not subject to review by any court or agency.

An employee or representative of employees may file a notice to contest the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. Failure to correct an alleged violation within the abatement period may result in a further proposed assessment of penalties.

As to alleged violations with an abatement period of 30 days or less, you are directed to promptly advise the Area Director as to the specific corrective action on each such violation and the date of such action.

Alleged violations having a longer abatement period will require a progress report at the end of each 30-day period. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director shall be so advised.

A followup inspection may be made for the purpose of ascertaining that you have posted the citations as required by the Act and corrected the alleged violations as you have reported. The Act provides that whoever knowingly gives false information is subject to a fine up to $10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address listed above.

U. S. Department of Labor
By Area Director
Chester C. Whiteside
Acting

Form OSHA - 2C
Aug. 1971

13a

Secretary's Citation for a Willful Serious Violation

203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	OSHA-1 NO.
N-2767	46
AREA	REGION
6010	2

OSHA-2A CITATION FOR A WILLFUL SERIOUS VIOLATION

Citation Number 1 of 1 Page 1 Date Issued April 13, 1973

EMPLOYER General Electric Company

(Street 1 River Road

ADDRESS (

(City Schenectady State New York Zip 12345

An inspection of a workplace under your ownership, operation, or control located at above address and described as follows Building #273 has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 CFR 1910.23(c)(1). Page 22109	Failure to provide protection against falling to an employee working on a 14 foot high horizontal stator frame, Bay H-17, by means of a standard railing or equivalent. Two work platforms six feet ten inches above the surrounding surface, Bay K-8, were not guarded on all sides by a standard railing. Failure to provide a standard railing for a powered work platform #15836, Bay K-11, that can be elevated to a height of ten feet.	Immediately upon receipt of this citation.

Area Director's Signature Chester C. Whiteside, Acting

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

[These pages omitted]

19a

Secretary's Citation for a Willful Serious Violation

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	OSHA-1 NO.
N-2767	46
AREA	REGION
6010	2

NOTIFICATION OF PROPOSED PENALTY

FOR A WILLFUL SERIOUS VIOLATION

TO: Mr. Donald Craig
Vice President and General Manager
General Electric Company
1 River Road
Schenectady, New York 12345

RECEIVED
APR 26 1973
D. [illegible]

On the 13th day of April, 1973, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS - WILLFUL

Citation No.	Proposed Penalty
1	$5,000.00

OTHER VIOLATIONS*

Citation No.	Item No.	Proposed Penalty
NONE		NONE

Total for All Alleged Violations $5,000.00

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse side)

Secretary's Citation for a Willful Serious Violation

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at Syracuse, New York this 13th day of April, 19 73.

Acting
Area Director
Occupational Safety and Health Administration
U. S. Department of Labor
203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

Form OSHA-3
Aug. 1971

Employer's Notice of Contest, dated April 17, 1973

April 17, 1973

Mr. Chester C. Whiteside
Acting Area Director
Occupational Safety & Health Administration
U. S. Department of Labor
203 Midtown Plaza
700 E. Water Street
Syracuse, New York 13210

NOTICE OF CONTEST

Re: CSHO No. N-2767

Dear Sir:

On April 16, 1973, General Electric Company received by certified mail a group of citations and associated notification of proposed penalty all of which are dated April 13, 1973, with regard to certain facilities located at 1 River Road, Schenectady, New York. All of these documents bore CSHO No. N-2767. A copy of each citation and notification of proposed penalty is attached.

This communication shall serve as written notification to you in accordance with the Occupational Safety & Health Act of 1970, P.L. 91-596 (Section 10(a) thereof and other sections) and regulations promulgated thereunder, that General Electric Company intends to and does hereby contest each and everyone of the above-mentioned citations (including each item contained therein) and also intends and does hereby contest each and everyone of the notifications of proposed penalty (including each proposed penalty contained therein) before the Occupational Safety & Health Review Commission.

This notification is postmarked within fifteen (15) working days of the receipt by General Electric Company of the above-mentioned citations and notifications of proposed penalty.

As indicated on the attached sheet a copy of this Notice of Contest is being served on the Unions which represent employees of the General Electric Company at its 1 River Road, Schenectady, New York facility whether or not they might be affected directly or indirectly by the matters covered in said citations.

Very truly yours,

Roland C. Radice
Attorney for
General Electric Company

RCR:ml
Encl.

cc: Mr. Dominick Fazzone, President
Local 147 of the American Federation
of Technical Engineers
243 State Street
Schenectady, New York 12305

Mr. Joseph Mangino
Business Agent
Local 301 IUE - AFL-CIO
121 Erie Boulevard
Schenectady, New York 12305

Mr. Howard Bennett
Secretary Treasurer
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America, Independent
Local 294
Labor Temple
890 Third Street
Albany, New York

Mr. Stanley A. Sowek
Business Manager
United Association of Journeymen & Apprentices of
the Plumbing & Pipe Fitting Industry of the United States
& Canada
Local 128
105 Clinton Street
Schenectady, New York 12305

Mr. Chester Granato
President
Industrial Association of Guards & Plant Protection Employees
3922 Albany Street
Schenectady, New York 12304

Mr. Major W. Cross
Business Manager
Schenectady Association of Patternmakers League of North America
31 Plaske Drive
Schenectady, New York 12309

Secretary's Complaint, dated May 4, 1973

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	:	
v.	:	OSHRC DOCKET
GENERAL ELECTRIC COMPANY,	:	NO. 2739
Respondent,	:	
LOCAL NO. 301, INTERNATIONAL UNION OF ELECTRICAL WORKERS,	:	
Authorized Employee Representative.	:	

COMPLAINT

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1604, 29 U.S.C. 651, et seq.), hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Part 1910) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

II

The respondent, GENERAL ELECTRIC COMPANY a corporation organized under the laws of the State of New York and doing business in the State of New York maintaining an office and place of business at One River Road, Schenectady, New York, is and at all times hereinafter mentioned was engaged in the manufacture of turbines.

III

Since on or about January 1, 1972 many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act.

IV

As a result of an inspection by an authorized representative of the plaintiff, respondent corporation was issued one citation for violations, six (6) citations for serious violations, one citation for repeated violations, and one (1) citation for serious repeated violations and one (1) citation for willful serious violations on April 13, 1973 pursuant to section 9(a) of the Act.

V

On March 21 and 22, 1973 at respondent corporation's facility at One River Road, Schenectady, New York, the respondent corporation violated the following standards which were promulgated pursuant to section 6 of the Act:

a) Respondent corporation violated 29 C.F.R. 1910.252 (b)(4)(ix)(c)' in that it failed to replace lengths of electrode (ground) cables which had exposed bare conductors. This condition existed in building No. 52, Bay A-12.

b) Respondent corporation violated the standards at 29 C.F.R. 1910.27(c)(4)' in that the distance from the centerline of a two inch rung of a fixed metal ladder was less than 7 inches. This lack of clearance existed at the 17 foot level of the ladder which was located in building No. 52, Bay A-32.

c) Respondent corporation violated the standards at 29 C.F.R. 1910.27(f)' in that the respondent corporation failed to maintain a fixed metal ladder in a safe condition. Specifically the side rails of the fixed metal ladder were bent to the left near the bottom so as to affect the safety and stability of the ladder. This condition existed in building No. 52, Bay B-24.

d) Respondent corporation violated the standards at 29 C.F.R. 1910.106(d)(2)(i)' in that approved container was not used for combustiable liquid. Specifically, in building No. 52, Bay A-18, an open 55 gallon drum was observed to be partially filled with combustible paint thinner.

e) Respondent corporation violated 29 C.F.R. 1910.176(a) in that where mechanical handling equipment was used permanent aisles and passageways were not appropriately marked and kept clear. This condition existed in building No. 52, Bay C.

f) Respondent corporation violated 29 C.F.R. 1910.27 (b)(1)(iii) in that the minimum clear length of rungs fixed metal ladders on horizontal drill presses catalog No. 16181 and No. 16182 were less than 16 inches. Specifically, they were measured at 12 inches. This condition existed in building No. 273, Bay H-17.

VI

The violations alleged in the citation for non serious violations set forth in paragraph V were violations within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the worksite.

VII

On March 21 and 22, 1973 at respondent corporation's facility at One River Road, Schenectady, New York, the respondent corporation violated the following standards which were promulgated pursuant to section 6 of the Act:

a) Respondent corporation violated 29 C.F.R. 1910.252(e) (1)(i) in that it failed to protect against falling two welders working on top of a slator frame 15 feet 3 inches above the surrounding surface in Bay A-2 of building No. 52 by railings, safety belts, life lines or other equally effective safeguards.

b) Respondent corporation violated 29 C.F.R. 1910.29 (a)(3)(i) in that the maximum work level height of a manually propelled scaffold exceeded four times the minimum or least base dimension of the scaffold. Specifically the scaffold was 26 feet, 10 inches in height and the base was only 5 feet two inches at its least base dimension, also, no provision was made to guide or brace the unit against tipping. This condition existed in building No. 52, Bay A-8.

c) Respondent corporation violated 29 C.F.R. 1910.27(d)(2) in that in building No. 52 a fixed metal ladder 24 feet, 4 inches in height, did not have the upper portion offset from the platform and lower portion of the ladder. Also in building No. 52, Bay A-32, two fixed metal ladders 24 feet 4 inches and 35 feet six inches in height, did not have either a cage, landing platform well or ladder safety device. Further in building No. 273, Bay K-1, a fixed metal ladder 25 feet 11 inches in height, did not have either a cage landing platform well or ladder safetydevice.

d) Respondent corporation failed to provide a safety guard for a portable abrasive wheel observed in use by employees grinding a turbine shell in Bay A-25, building No. 52. The diameter of the wheel was measured at five inches. This was a violation of 29 C.F.R. 1910.243(c)(1)(i).

e) Respondent corporation violated 29 C.F.R. 1910.179 (f)(4)(vii) in that in building No. 52, Bay C furnace room the overhead crane was not equipped with a trolley brake of sufficient size to stop the troldey or bridge within a distance in feet equal to 10 percent of full load speed in feet per minute when traveling at full speed with a full load.

f) Respondent violated 29 C.F.R. 1910.243(b)(1)(iii) in that it failed to provide a tool retainer on a portable hand-held pneumatic chisel that was able to eject the tool. This condition existed in building No. 52, Bay A-9.

VIII

The violations alleged in the citations as set forth in paragrah VII above were violations within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent knew, or could with the exercise of reasonable diligence have known, of the presence of the violations.

IX

On March 21 and 22 at the respondent corporation's facility at One River Road, Schenectady, New York the respondent corporation violated the following standards which were promulgated pursuant to section 6 of the Act:

a) Respondent corporation violated 29 C.F.R. 1910.22(a)(1) Bay A-7, Building No. 52 was not kept in a clean and orderly fashion. Specifically welding leads and compressed air hoses, in use were scattered about the floor in the work area of the employees so as to be a tripping hazard.

b) Respondent corporation violated 29 C.F.R. 1910.157 (a)(2) in that a hand held CO2 fire extinguisher in Bay A-19, Building No. 52 was not readily accessible for immediate availability because of its being obstructed and obscured by compressed air hoses.

c) Respondent corporation violated 29 C.F.R. 1910.252 (c)(2)(iii) in that in building No. 52, bays B-12, B-11 and A-9 welding screens, shields or goggles were not utilized or provided to protect the workers and other persons adjacent to these areas from the arc welding rays while the welding operation was in progress.

X

The violationsalleged in the citation in paragraph IX were violations within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the work site. These violations were also repeated violations within the meaning of section 17(a) of the Act.

XI

On March 21 and 22, 1973 at the respondent corporation's facility at One River Road, Schenectady, New York the respondent corporation violated 29 C.F.R. 1910.133(a)(1) inthat the respondent corporation failed to provide suitable eye protection for two employees in building No. 273, Bay K-13 who were using a jack hammer to break up concrete.

XII

The violation alleged in the citation as set forth in paragraph XI above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent, knew, or could with the exercise

of reasonable diligence have known, of the presence of the violation. This violation was also a repeated violation within the meaning of section 17(a) of the Act.

XIII

On March 21 and 22, 1973, at the respondent corporation's facility at One River Road, Schenectady, New York, the respondent corporation violated 29 C.F.R. 1910.23(c)(1) in that it did not provide a standard railing or the equivalent as specified in 29 C.F.R. 1910.23(c)(3) on open sided platform or floor 4 feet or more above adjacent floors or ground level. Specifically, unguarded was a 14 foot high horizontal stator frame, building No. 273, Bay H-17; two work platforms six feet ten inches above the surrounding surface in building No. 273 in Bay K-8, and a powered work platform no. 15836 in building No. 273, Bay K-11 that could be elevated to a height of ten feet.

XIV

The violation alleged in the citation as set forth in paragraph XIII above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent knew or could with the exercise of reasonable diligence have known, of the presence of the violations. This violation was also a willful violation within the meaning of section 17(a) of the Act.

XV

On April 13, 1973 a notification of proposed penalty for the citations was served on the respondent corporation, proposing a penalty of $14,800.00. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

XVI

On April 19, 1973 the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citations and the proposed assessment of the penalties pursuant to the provisions of section 10(c) of the Act. This notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

XVII

Several of respondent's employees are affected by the violation reflected in paragraphs V, VII, IX, XI AND XIII herein. The authorized employee representative of the affected employees is Local 301, International Union of Electrical Workers which has an office at 121 Erie Boulevard,

Schenectady, New York. At all times relevant herein it has had a collective bargaining agreement with the respondent corporation.

WHEREFORE, the aforesaid citation and proposed penalty should be affirmed.

/s/ WILLIM J. KILBERG
WILLIAM J. KILBERG
Solicitor of Labor

/s/ FRANCIS V. LA RUFFA
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ LOUIS D. DE BERNARDO
LOUIS D. DE BERNARDO
Attorney

UNITED STATES DEPARTMENT OF LABOR, ATTORNEYS FOR PETER J. BRENNAN, SECRETARY OF LABOR.

Notice to the GENERAL ELECTRIC COMPANY

You are hereby notified that you must plead or otherwise answer this complaint, either denying or admitting the allegations, within 15 days of your receipt of this complaint. Failure to do so may result in dismissal of your notice of contest. See Rule 33(b), Rules of Procedure, Occupational Safety and Health Review Commission.

Employer's Answer, dated May 22, 1973

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, v. GENERAL ELECTRIC COMPANY, Respondent, LOCAL NO. 301, INTERNATIONAL UNION OF ELECTRICAL WORKERS, Authorized Employee Representative.	OSHRC DOCKET NO. 2739

ANSWER

Now comes the General Electric Company Respondent in the above-entitled matter and for its answer to the complaint by its attorneys, upon information and belief denies the allegations contained in the opening paragraph of the Complaint under the heading Complaint and alleges upon information and belief, with respect to the other allegations in the Complaint as follows:

I

Respondent admits paragraph I of the Complaint.

II

Respondent admits paragraph II of the Complaint, and in addition states that at its place of business on One River Road, Schenectady, New York, it is engaged in the manufacture of many products,

including turbines, generators, various types of electric motors, gas turbines and tubes and castings and consists of components representing 13 divisions and 62 departments or operations at department levels.

III

Respondent admits paragraph III of the Complaint.

IV

Respondent denies each and every allegation contained in paragraph marked and numbered IV except that one citation for serious repeated violations, one citation for willful serious violations, and one citation for violations were received by Respondent on April 16, 1973.

V

Respondent denies each and every allegation contained in the paragraph marked and numbered V in the Complaint and each and every subdivision thereof except that it admits that with respect to subdivision (c) that the side rails of a fixed ladder were bent and that this ladder was located in Building 52, Bay B-24; and with respect to subdivision (d) that an open 55 gallon drum was located in Building 52; and that with respect to subdivision (f) the existence of fixed ladders on horizontal drill presses (catalog Nos. 16181 and 16182) with 12 inch rungs in Building 273, Bay H-17.

VI

Respondent denies each and every allegation contained in the paragraph marked and numbered VI in the Complaint.

VII

Respondent denies each and every allegation contained in the paragraph marked and numbered VII in the Complaint and each and every subdivision thereof except it admits that with respect to subdivision

(a) that two welders were working on top of a stator frame in Building 52, Bay A-2 and that said stator frame was over 15 feet in height; and with respect to subdivision (c) it admits the existence of said ladders at the height quoted in the Complaint.

VIII

Respondent denies each and every allegation contained in the paragraph marked and numbered VIII in the Complaint.

IX

Respondent denies each and every allegation contained in the paragraph marked and numbered IX in the Complaint and each and every subdivision thereof except that with respect to subdivision (b) it admits there was a hand held fire extinguisher in Building 52.

X

Respondent denies each and every allegation contained in the paragraph marked and numbered X in the Complaint.

XI

Respondent denies each and every allegation contained in the paragraph marked and numbered XI in the Complaint.

XII

Respondent denies each and every allegation contained in the paragraph marked and numbered XII in the Complaint.

XIII

Respondent denies each and every allegation contained in the paragraph marked and numbered XIII in the Complaint.

XIV

Respondent denies each and every allegation contained in the paragraph marked and numbered XIV in the Complaint.

XV

Respondent denies each and every allegation contained in the paragraph marked and numbered XV in the Complaint except that it admits that it received a notification of proposed penalty for the citations on April 16, 1973 which proposed a penalty of $14,800.

XVI

Respondent admits each and every allegation contained in the paragraph marked and numbered XVI in the Complaint.

XVII

Respondent denies each and every allegation contained in the paragraph marked and numbered XVII in the Complaint except that it admits Local 301, International Union of Electrical Workers is the certified bargaining agent for certain production and maintenance employees at the 1 River Road facilities of the General Electric as well as the certified bargaining agent for powerhouse employees at the 1 River Road facilities.

Further, Respondent admits that the International Union and its local affiliates, including Local 301, had at all times relevant herein a collective bargaining agreement with Respondent.

AS A FIRST DEFENSE TO THE COMPLAINT:

Matters alleged in the Complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 (84 stat. 1604, 29 U.S.C. 651, et seq.) as the standards cited are unreasonable and are inconsistent with other standards contained in 29 C.F.R. 1910 et seq.

AS A SECOND DEFENSE TO THE COMPLAINT:

Matters alleged in the Complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 as the citations and standards incorporated in the Complaint are so vague and ambiguous and lack particularity so as to fail to conform with Section 9 (a) of the Act and further are so vague and ambiguous as to be unconstitutional.

AS A THIRD DEFENSE TO THE COMPLAINT:

Matters alleged in the Complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 as the citations and standards incorporated in the Complaint are so unreasonable as to be unconstitutional.

AS A FOURTH DEFENSE TO THE COMPLAINT:

The standards referred to in the Complaint and its underlying citations are beyond the purview of the Occupational Safety and Health Act of 1970.

AS A FIFTH DEFENSE TO THE COMPLAINT:

Matters alleged in the Complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 as the citations and standards incorporated in the Complaint as applied to the facts are so vague and ambiguous and lack such particularity as to be unconstitutional.

AS A SIXTH DEFENSE TO THE COMPLAINT:

Matters alleged in the Complaint and in the underlying citations do not constitute a violation as the citations and standards incorporated in the Complaint are so unreasonable as applied to the facts in this case as to be unconstitutional.

AS A SEVENTH DEFENSE TO THE COMPLAINT:

The penalties proposed are arbitrary and capricious, and thus unconstitutional and void.

AS A EIGHTH DEFENSE TO THE COMPLAINT:

The penalties proposed fail to properly consider the statutory criteria as required under 17 (j) of the Act.

AS A NINTH DEFENSE TO THE COMPLAINT:

Abatement periods contained in the Complaint are unreasonable.

AS A TENTH DEFENSE TO THE COMPLAINT:

The Respondent has not been cited with reasonable promptness as required by Section 9 (a) of the Act.

AS A ELEVENTH DEFENSE TO THE COMPLAINT:

The citations are improper as the abatement periods required are without statutory or any other authority.

AS A TWELFTH DEFENSE TO THE COMPLAINT:

The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Respondent demands that the Complaint and the underlying citations and proposed penalties be dismissed and that the Court grant to this Respondent such other further and different relief as the justice of the cause may require.

Respectfully submitted,

Roland C. Radice, Esq.

By _____
Edward J. Cummings, Jr., Esq.

Attorneys for the Respondent
GENERAL ELECTRIC COMPANY
Building 273 - Room 441
One River Road
Schenectady, New York 12345

Schenectady, New York
May 22, 1973

Stenographic Transcript of Testimony Taken Before Administrative Law Judge Charles K. Chaplin on June 19, 20 and 21, 1973

Mr. Cummings, didn't you ask for penalty worksheets and the compliance officer's investigative notes?

MR. CUMMINGS: Yes, sir, I did.

THE COURT: What is this he is reading from? Are these your investigative notes?

THE WITNESS: Yes, sir. This is the worksheet that I used to fill out as I walk around the plant.

MR. CUMMINGS: To clarify that, I said C-1, and apparently I didn't have the right number.

THE COURT: I am aware of that at this point.

Are you going to make this available to Mr. Cummings?

MR. DeBERNARDO: At the end of cross examination, and if he requests to see a copy, we will.

THE COURT: Fine.

MR. MACLAY: I think that I should say, Counsel already told us that he would give us that. I didn't want a misunderstanding, and he volunteered to do it.

MR. DeBERNARDO: I will give a copy for your use during the cross examination.

MR. MACLAY: I just wanted to make sure that you--

Q Now, that is the violation of 243(c)(1)(i), isn't it?

A Well, you gave it to me, and I can't hold it in my

MR. DeBERNARDO: I move that the Exhibits C-11 and 12 be accepted into evidence.

MR. CUMMINGS: No objection.

MR. CHERTKOV: No objection.

THE COURT: They will be admitted, as C-11 and C-12.

(Exhibits C-11 and C-12 received into evidence.)

Q Now, the citation for, the repeated, serious repeated violations, involves section 133(a)(1). Now, what did you observe that caused you to recommend that a citation be issued for this particular condition?

A We were walking down the Bay K-13 and I observed two employees using an air hammer on the floor, breaking up the concrete and not using any eye protection.

Q What, exactly, were they using to break up the concrete?

A A pneumatic hammer.

Q Approximately how big is a pneumatic hammer?

A I would say the length of the hammer itself is probably 3 1/2 feet in length, 3 feet.

Q How does a pneumatic hammer break up concrete?

A By vibration, pounding on and off the floor.

Q What kind of a tool does it retain?

A A metal chisel.

Q Would you describe how these employees were using that pneumatic chisel to break up the concrete, the hammer?

A There were two of them, and one of them was operating the hammer and they had already broken up some of the floor, and the other one was standing down in the portion already broken and he was operating it, and breaking away the concrete.

Q Now, when you say the employees were wearing no eye protection, what do you mean exactly? Be specific.

A They are required to wear a goggle or a type of a glass that will protect the, any particles from the concrete flying up and entering into the eyes from top, bottom and the sides or the front, and they have got to be safety, and so they will not break. They can't let the dust or the concrete particles go into the eye. They must have the eye completely protected.

Q Were these employees wearing any type of a glasses or goggles?

A At the time I walked up to them neither one of them were wearing anything.

Q You mean there was absolutely no protection on their eyes?

A None whatsoever.

Q Did you take the names of these employees?

A Yes, I did.

Q Would you refresh your recollection?

A The names of the two employees involved, the first man was Bruce Henkel-- H-e-n-k-e-l and the other one, Edwin VanBlarcom V-a-n-B-l-a-r-c-o-m.

Q Now, was there anything obstructing your view of these employees? Were they visible?

A No. They were right to the left as we were walking down the aisle in K-13.

Q Could you see them in the aisle?

A Yes, I could.

Q Was there anything at all obstructing your view?

A Absolutely nothing.

Q Would a person walking down that aisle have been able to see them?

A Yes.

Q Easily?

A Very easily.

Q Would you describe your inspection as to this particular-- what exactly happened during the course of the inspection?

A As I approached the two employees, and I started to talk to them and I asked them where their eye protection is. Mr. Dave Guilbault came right up behind me and told the employees that they were to cease the operations immediately, until they got their eye protection on. To the best of my knowledge they did stop.

Q Did they have any eye protection on their person, or was it on them--

A I asked one man, I believe the first man's name I got, Bruce Henkel, and I am not positive, and he was the actual

man I think it was, and he answered to the effect that it was either back in his locker or back somewhere, as I recollect. I did not write that down. He did not have it on his person.

Q During the course of your inspection, though it is not mentioned in the citation, and not before the Commission, and was anyone— did you see any other instances of improper eye protection?

A Yes, I did, two.

Q Would you describe them, for the record?

A The first one, when we first walked into the Building 52—

MR. CUMMINS: I am going to object, at this time. Is this a part of the citation that we are talking about?

THE COURT: What is the purpose of this?

MR. DOMENICANDO: Well, this is personal protective equipment case, and we have to, not what we have to, but other evidence of incidents of personal protection and employees not wearing it, would be relevant to show the lax policy on the part of management. We are not amending our pleadings in any way, other than the incident with the jack hammer.

THE COURT: You have already got testimony of two, and you have got the arc welding glasses not being worn

and the pneumatic air hammer operator not wearing glasses, and now you want to talk about the third one?

MR. DeBERNARDO: I would just like it on the record.

THE COURT: Do you have any comment?

MR. CHERTKOV: I think--

THE COURT: G.E. has objected to this line of questioning.

MR. CHERTKOV: But the question was simply whether or not the witness had seen any other employee not wearing glasses? Is that not correct?

MR. DeBERNARDO: Any other instances.

MR. CHERTKOV: I think it is absolutely relevant to this proceeding, and we are talking about serious repeated willful violations.

THE COURT: I am going to permit him to answer the questions in the line going to the good faith of the company, in this respect.

You may answer the question.

A When we entered Building 52, there were four employees, and I did not take their names, and they were working on an overhead small type of a hoist, repairing it, and as you entered the building there is a sign there, says, "Mandatory that you wear eye protection in the building at all times."

One individual on the ground and one up on the hoist did not have it on, and I asked them where their eye protection

was, and one of them had it in their back pocket, and the other one indicated something to the effect that it is in my tool box, and I just didn't have it on.

Q What were these particular employees doing? What type of an operation?

A Some type of a maintenance function on that hoist.

Q What was the hazard presented to the employees who were using the jack hammer to bust concrete?

A Particles of the concrete itself, or concrete dust entering the eyes and possibly causing blindness.

Q You stated that one employee was using the broom; is that correct?

A No. I did not say that. To the best of my knowledge, when I walked up, and he was standing in the portion that was already broken up and exactly what he was doing, and I don't know. He was standing right next to the hammer, and I don't know exactly what job his was.

Q Was his back to the concrete?

A He was standing there facing the operation of the hammer.

Q Let's go to the citation for the willful serious violation. This is violation of 23(c)(1). Let's start off with the first item of this particular violation.

I ask to the first violation, and what building were you in?

A Building 273.

Q Does this go for all three items of violation?

A Yes, all three.

Q Let's start with the top violation. Tell us what you observed that caused you to recommend that a citation be issued for failure to have a standard railing around that stator frame.

A Two personnel operating on, alternately, required to climb up on top of this horizontal stator frame and drill holes into certain portions of it on the top. They were 14 foot above the ground, which is a hard surface, and if they fell, the thing that compounded it, was that the drill that they were using, the horizontal drill was leaking oil, and excessive oil on the sides of that stator frame which would cause them to slip, also.

Q Were any pictures taken of that stator frame?

A Yes. Mr. Bernard took pictures.

THE COURT: Any objection, Mr. Cummings?

MR. CUMMINGS: None, sir.

THE COURT: Mr. Chertkov?

MR. CHERTKOV: No objection.

THE COURT: Mark it C-13.

(Exhibit C-13 marked for identification.)

Q Would you identify C-13?

A This is the stator frame in question, and that was Bay H-17, Building 273, and that is the drill press that they

were utilizing to put the holes in the flat piece on top, and the oil is all over the top of the frame.

THE COURT: Do you want to move its admission?

MR. DeBERNARDO: I move that this be accepted into evidence.

THE COURT: It will be accepted, C-13.

(Exhibit C-13 received into evidence.)

Q Now, what position was this stator frame in?

A Horizontal.

Q It was lying on its side?

A Lying on its side.

Q Would you, for the record, describe what a stator frame looks like, or this particular stator frame in question?

A It is almost perfectly round, and it is a cover, I think, more or less, and hollow through the center, and on the top, or portion he was working on, there was the flat portion, and probably a foot square that he was required to drill, and I think he told me 48 holes, and he had to drill, and I don't know for what purpose.

Q Now, do you have any knowledge of stator frames?

A No. I have no knowledge other than the fact that I saw it.

Q Were there any standard railings on that particular stator frame, and any type of a personal protective equipment?

MR. CUMMINGS: I am going to object to that question.

I think that it is improper. The standard, as I read it, allows a railing or equivalent. As I read "equivalent", and it is merely a different form of a railing, and perhaps made of different material.

Therefore, "the other form of protective equipment" part of that question I object to, and it is just irrelevant, given the citation.

MR. DeBERNARDO: Well, possibly the question was improper in terms of form. I asked two questions.

THE COURT: Do you want to rephrase it?

MR. DeBERNARDO: Yes.

THE COURT: Please rephrase it.

Q Was there any type of a standard railing on that particular stator frame that you observed?

A No, there was not.

Q Was there any type of a, its equivalent, in terms of a standard railing, a substitute for a standard railing?

A No, there was not.

Q Was the employee wearing any safety belt or life line or anything like that?

A No.

MR. CUMMINGS: Again, I will renew the objection.

MR. DeBERNARDO: On that grounds, let me say, Your Honor, in answer to the objection, that if the employee was wearing some sort of a safety belt.

or some sort of a safety mechanism, and this would go to the gravity and substantial probability of death or serious injury.

THE COURT: I would permit that going to gravity of the violation. You may answer.

A Answer again? No, he did not have any life line of any type.

Q Okay. Was there any type of a protective equipment at all on this particular employee?

A No, there was not.

Q In your opinion, did you consider this a working surface, the top of that stator frame?

A Yes. That is where the man performs his job.

Q Would you give us the reasons for this particular-- was it your conclusion that this was a working surface?

MR. CUMMINGS: I am going to object, Your Honor.

I think that he is calling for a legal conclusion. It seems to me. I don't know whether this particular witness is qualified to do that, and I will object.

THE COURT: I am going to overrule your objection, Mr. Cummings, and it is a factual question, and was the man working there, or wasn't he. Nothing legal about that.

A The man's job required him to get on top of this 14 foot, or other size, I assume that there are different sizes,

stater frames, and that is where he performed his function on top, and that would be his working surface. That is where he does his job.

Q Now, where were you standing when you observed this particular violation? How far away, I should say?

A About 25 feet, the first time I saw him.

Q Was this particular condition in any way obstructed from your view?

A No, it was not.

Q You could view it easily?

A I was on one side of an aisle, and that particular stator frame he was on this end toward me, and was right there on the other side.

Q Clearly visible to you?

A Clearly visible.

Q What is the hazard presented by this condition?

A Falling off of that frame, went to the hard surface below, and compounded by the fact that the machine in question was leaking, and there was oil on the top of that, which would make it extremely slippery up there.

Q To your knowledge do you know where that oil came from?

A Yes. I inquired into it, from one of the employees, and he indicated that it came out of the horizontal drill press that they use to put the holes in the stator frame.

Q Let's go to the second item of that. That citation for willful serious violation.

What did you observe in Bay K-8 that caused you to recommend that a citation be issued?

A Once again, there were personnel, and they were working on platforms 6 feet 10 inches above the surface of the ground area, and in Bay K-8, and they were not provided with a standard railing.

Q Were employees on these particular platforms?

A Yes, they were.

Q Were any pictures taken?

A Yes. I believe Mr. Bernard took some pictures of that, also.

(Exhibit C-14 marked for identification.)

Q Would you identify this picture, Mr. Nead?

A This is one of the two platforms in Bay K-8, Building 273, that had an inadequate standard railing.

Q Now, would you look at that picture and tell us why, in your opinion, this particular standard railing--

THE COURT: Do you want to move its admission?

MR. DeBERNARDO: I move that this be accepted into evidence.

MR. CUMMINGS: No objection.

THE COURT: Any objection?

MR. CHERSKOV: No objection.

THE COURT: It would be admitted as C-14.

(Exhibit C-14 received into evidence.)

Q Now, would you tell us from looking at this picture what was inadequate about the standard railing?

A In this particular picture that we are talking about now, there is no mid-rail on the standard railing. All there is is a top railing and a board used as a toe board. There is no mid-rail, and they could back right off.

Q It is indicated at the top of the picture, and a yellow line, a yellow streak. Was that the top rail or the mid-rail?

A The top.

Q That is the top rail?

A Yes.

Q In other words, there was no mid-rail?

A I would have to look at my 1-A's once again, and we took a couple of them. Let me see which one. In this picture it is the one with no mid-rail, and on the other side the chain was too loose to provide a proper railing on the other side.

Q Now was the chain on the other side-- describe it in your own words.

A Just laying there, more or less, in a bowed position, rather than a pulled taut. Now, this was the lack of the mid-rail.

Q Now, is there a standard, is there any type-- you see

existent mid-rail; is that correct?

A That is correct.

Q Now, what especially about the lack of the mid-rail--what is the hazard there?

A Well, the hazard mainly, these particular individuals, they were in bent positions, which is part of the working positions, and the walk itself was not very wide, and I didn't take an actual measurement, and it wasn't very wide, and they could have easily, in the squatted position, backed right off and went down to the surface below.

Q Were any measurements taken at the height of this particular, of these particular platforms?

A Yes. Mr. Bernard took the measurements, and they were 6 feet 10 inches above the floor level.

Q Did you observe Mr. Bernard take these measurements?

A Yes, I did.

Q Let's go to the third item of the citation. The failure to provide a standard railing for powered work platform, K-11.

What, exactly, did you observe that caused you to recommend the citation be issued in this violation?

A This particular power work platform was sitting right on the corner, where it crossed two aisleways, and was not in operation at the time. It was driven, and it was in the lower position, and work on the scissors type principle, and raises up over 10 feet, and I questioned. I believe Mr. Bernard also

questioned a foreman, whose name I don't remember, and I don't think that I wrote it down, and we asked him where his standard railing was for that platform.

We already saw the holes where they stick them in there. He said that he didn't know where they were, and he asked around, and nobody seemed to know where they were.

Q When you say there were holes, and would you describe where you mean? First describe, in some detail, the powered work platform.

A The platform itself was metal, and it was absolutely no guarding whatsoever, and it was just a flat floor surface that raised on a scissors principle, up to and over 10 feet, according to that person that I talked to.

The holes in it, they had spot welded on there, and post holes, probably about that deep and where they stick these poles in for the standard railing.

In other words, to remove them. Sometimes they work on a crane, and they have to remove to one side, which is okay, because they are right up against the stator frame with the open side, and because there is no problem with falling. That is why I used what they call a removable rail, because there was no railing in it.

Q When you say, you made a motion with your hand, saying that deep, and could you describe how deep the holes were for that?

A They are more of a socket than I think of a hole. Where the posts went. I would say that they probably are six inches, four to six inches in depth.

Q Then this was flat surface, this powered--

A The platform where he stood was flat surfaced, opened on all sides, except the portion where it goes up on the framework.

Q Were there any employees working this platform at the time of your inspection?

A No. It was on the lower position, and they said that they did use it.

Q Who said that they did use it?

A This individual. I didn't get the foreman who operates right in that area.

Q Is this platform located in the working area?

A Yes, it was.

Q Did it appear to be in storage?

A No. In the working area.

Q Now, did you make any inquiries as to whether or not they had a standard railing for this work platform?

A Yes. I asked the same individual's name, and I can't remember, and he indicated that he thought he had seen it somewhere, and he asked around and nobody else seemed to remember ever seeing it, and they couldn't produce it, no one.

Q Do you know the height that this platform could be raised to?

A I asked the same person, and he said over 10 foot, a little over 10 foot.

Q At the time that you observed it, what was the height of the platform?

A At ground zero. On the ground.

Q It was on the ground?

A Yes.

Q It wasn't elevated?

A No, it was not.

Q What was the hazard presented to the employees by this particular condition?

A Well, to go up on the platform without no standard railing on it, as that was, and it could have very easily fallen off, up to and including a 10 foot level on the hard surface below and hurt themselves.

Q It was the danger of falling?

A Right.

Q Was this particular work platform, was it out in the open? Was it visible?

A Yes, it was. Right on the corner where two aisles intersect, the intersection.

Q Did they hinder your view of that work platform?

A It did not hinder my view.

Q Out in the open and you observed it?

A Platform was in the open.

Q Now, have you at any time in the past cited, as a result of your inspection, G.E. for violation of 23(g)(1)? You may look at the exhibit if you want.

A Yes, I did.

Q Would you look at Exhibit C-4?

This is a final order of the Review Commission, and not subject to review by any court or agency, but, for the record, would you state what you cited them for as a result of this inspection of yours.

A I went into Building 61, complaint, and cited them for number 1 and 2 weld position platforms and also the 2 outboard supports, and none of them were equipped with a standard guardrail on all sides as required. Also I cited them for no toe board which is also on the same railing.

Q Now, who was present at this particular inspection that gave rise to the two citations marked C-4? Management representative.

A Management was, once again, Mr. Dave Guilbault and Milton Rhodes, and the man who was responsible for this particular building, whose name slips me, and it is on the 1-C, and I don't remember his name.

Q Who was present during your investigation of the 273 building, that is the subject of today's hearing? Was Mr. Guilbault there?

A Yes, he was.

and with me myself, I didn't see it until it was brought to my attention, by the employee reps.

Q Were you looking at it, sir?

A I was in that immediate area, and I didn't see it.

Q You weren't looking in that direction?

A I can't say if I was looking at the direction or not, and I was in that immediate area.

Q Were most people in Building 52 wearing safety glasses, if you know, sir?

A I say the biggest percentage of them, yes, were wearing them. When you say "safety glasses", and you are talking about [illegible], specifically?

Q Did you see any signs mandating their usage?

A Yes. There were signs before you enter the building, and inside, and they must wear safety glasses on these premises.

Q Plainly visible, and no problem about that?

A Absolutely.

Q The welding leads that were scattered about, as you charge, were the welders working in that area, sir?

A Yes, they were.

Q How many welders were working in that area, would you say?

A Two. Two were welding.

Q Two were actually welding?

A And other personnel was walking by.

that there were a few people. I don't really recall. Three or four, I think?

A The same area.

Q No. In the Building 52, now.

A Okay.

Q Who didn't have safety glasses immediately on; is that correct? Didn't have them on when you observed them?

A Well, talking about safety glasses and not talking about welding shields?

Q Plain safety glasses.

A The people that I observed, that were not wearing them, and were the two people, and the two men that were utilizing the air hammer, and I saw the individuals working, as you come in the door, on Building 52, and one was on the ground and one was on the hoist, and neither one of them had them on.

Q How many of those individuals did you talk to?

A The guys operating the air hammer, both of them, and one of the two that were down in the other area.

Q Did they indicate that plain frontal eyeglasses, safety, of a safety hardness, were not provided to them?

A They did not make any mention of that, that I remember.

Q In point of fact, some of them said, "Hey, I leave it in my locker, or it is in my pocket" or something like that, right?

speak for themselves, excuse me, previous citations. What is repeated is a matter of law. I mean, interpreted by you, Judge.

MR. CUMMINGS: I will withdraw the question.

Q Were they actually breaking concrete, now, when you observed them?

A Yes.

Q What did you observe? Were there pieces flying up around their face and all that?

A When I walked up on the scene and the one individual was standing in the portion that was already broken up, and would put him a little lower level than the other man, and he wasn't operating the hammer; the guy who was operating the hammer was on the end, and there were pieces and fragments of concrete moving in all directions.

Q How high up off the ground would you say that the pieces and fragments were moving when you observed?

A When I walked up, and they stopped, and right after I got there and I didn't measure them for that. They come that high off the ground, and 3 feet, maybe one come 6, and depending on size.

Q You saw one come 6?

A No. I say could go 6, and could go 10, and it is hard to say.

Q You may what you saw.

A What I saw, it was getting on his clothes, the dust portions of it, and the small rock portions were flying up toward him, and to what height, I really can't say.

Q You said about 3 feet?

A Because as soon as I got there, and I told Dave about it, and Dave Guilbault, and he stopped the operation.

Q The K-11, so-called powered work platform, and the foreman told you that he uses rails; is that correct?

A No, that is not.

Q What did he tell you?

A I went up on the scene, and, once again, I noticed the bracket holes for the railings, and I assumed that at one time or the other they were provided, or at least they were making an attempt to, and I asked the foreman where they were. He made indication that "I think they are in the area", and after talking to the other people, and they didn't know where they were. There were no railings there.

Q Did you make any inquiries as to how often this machine was used?

A I asked him how often it was used, and he said not very often, but it was used.

Q Did the foreman admit that it was used without rails?

A Did he admit to me without rails?

Q Yes.

A He said that he uses it, and there is no rails there.

Q He didn't say that "I use it without rails"?

A He said he uses it.

Q Period. Is that right?

A Right.

Q Okay. Now, you said no one else can remember ever seeing it. Who were these other people?

A He talked to a few of the employees who work in and around this same piece of apparatus.

Q Did you hear talk?

A Yes. I heard him talking to the two people, and he asked them if they knew what a railing was, and they didn't even indicate the knowledge that they know what you want—

Q Were these men that were using the equipment?

A I assume that they were, and if one of them was talking to him.

Q You don't know?

A No. I don't know.

Q Now, this was a portable stand?

A You are still talking about the same work platform?

Q Yes.

A Portable? Well, it was possible to move it.

Q Were there wheels on it?

A That I don't recall if there was or not, and I don't believe that there was.

Q How heavy would you say that the item was?

A Oh, I would say it would go at least 2 1/2 tons, anyway. It was a pretty good size.

Q It wasn't part of the real estate, though, was it?

A No. It was attached to a verti al-- all I could say is a post type of an affair that it was attached to, to raise it up and down with the aid of the scissors position, is all I remember.

Q The post was part of the machine?

A The machine, yes.

Q On the 6 foot 10 inch, what you call work platform-- excuse me-- Bay K-8, I think it is, with regard to that, what was that made of, sir? What was the structure of that item?

A It was made of wood. It had a chain on it, and it also had the portion of a railing made out of round metal, tubing, I should say.

Q The rod was the platform part of it?

A They were using the wood as that, and using it as a toe board.

Q Holding up the board was tubular metal?

A There was metal underneath holding it up, and as to whether or not it was tubular, I don't know. I was talking about the guardrail was tubular on the one side.

Q Yes. Were there top rails all the way around this item?

A No. No top rail across the front at all. The employer

wasn't cited for that, because this piece of equipment is always up snug, and so there wouldn't be no problem falling through. They weren't written up for that, and the main problem was that there was no mid-rail, but in the case if they did have one mid-rail, a chain, and it was too loose to do any good.

Q How many sides were there no mid-rail?

A On the two that I looked at, on one, two sides no mid-rail, and on the other side a loose chain, and on the other 6 foot 10, and the same area, and it was no mid-rail on the front, and going to the aisle, and, also, on the left side.

THE COURT: How many sides?

THE WITNESS: On two sides there were no mid-rail, and on the other two sides, and on, plus the other one, one side was inadequate.

MR. CUMMINGS: I would like to see C-14.

Q I show you C-14, and is this one of the two platforms cited?

A Yes. This is one of the two.

Q Which one is that? How many mid-rails does that have, if any?

A This had the one mid-rail on the one side, right here, and you could even see in the picture, and going down, and this is still the front. That is the mid-rail, that side.

Q Yes.

A It had one mid-rail.

Honor.

Q Do I understand correctly, Mr. Nead, that you had nothing to do with the classification of these various alleged offenses as either willful or serious or repeated or et cetera?

A Repeat that, please?

Q Is it your testimony that you had nothing to do with the recommendation or the decision, either one, that these particular alleged violations were either willful or serious or repeated?

A The final decision was made by Mr. Bernard up at Syracuse.

Q But did you make recommendations?

A They were, the final recommendations were made by Mr. Bernard. I made out the 1-A's the 2's, and he made the final decision up there as to--

Q When you say 1-A and 2--

A Worksheets.

MR. CUMMINGS: May I ask, on the record, are we going to be furnished with that, Mr. DeBernardo?

MR. DeBERNARDO: As I stated previously, we follow the Jencks rule, and you ask the employee, did he use them for preparation, and we will turn them over if he does.

MR. MACLAY: Do you know whether these formal documents, that you used, are available under the Freedom of

Information Act?

MR. DeBERNARDO: Are they available under the Freedom of Information Act?

MR. MACLAY: Have other people gotten them?

MR. DeBERNARDO: Under the Freedom of Information Act, my experience has been, and I think it is exemption number 7, a file is prepared for litigation, and it is prepared for enforcement purposes and litigation, it is exempt from litigation.

MR. MACLAY: Everything that is, and forms and regulations and the instructions to your personnel in preparing the case?

MR. DeBERNARDO: Yes, everything except the citation, which is a public document.

MR. MACLAY: Your position is that everything, except the citations are privileged or private?

MR. DeBERNARDO: This man has taken the witness stand, and anything that he used in preparation for that hearing is, and we would have to turn over under the Jencks rule for cross examination.

THE COURT: Let's cut through this. Are you going to turn it over or aren't you?

MR. DeBERNARDO: They haven't made the demand.

MR. CUMMINGS: I will now make the demand.

THE COURT: You now had a request.

Are you going to turn it over?

MR. DeBERNARDO: Ask Mr. Nead what documents he used in preparation for this hearing, and then--

Q If that would help expedite things, and assume that the questions have been asked.

A What documents did I use before I forwarded them to Syracuse?

Q Yes.

A I used an OSHA 1, and a 1-A, 1-C, 2, 10, 3, and to the best of my knowledge that is it.

MR. CUMMINGS: Therefore, I move that the 1 and 1-A be furnished on request.

THE COURT: Do you have these forms with you?

We have a request for the forms. We have been asked if they are here. Let's get the answer, and then we could go off the record for your purpose, whatever it is.

Does the witness have them?

THE WITNESS: I have the 1-A, sir.

THE COURT: The witness has the 1-A, he says.

MR. DeBERNARDO: Let the record show that I am handing Mr. Cummings the 1-A.

MR. CUMMINGS: I have no further questions.

THE COURT: You asked for the 1-C?

MR. CUMMINGS: Yes.

The stator frame was slippery from oil and 14 foot off the floor level."

Now, Mr. Nead, on that particular alleged violation, did anyone go up to the top of the stator frame, anyone from OSHA?

MR. DeBERNARDO: Could Mr. Nead refer to the Exhibit C-13?

MR. CUMMINGS: No problem.

A An OSHA representative did not go up on top, and at least I did not, and I don't remember if Mr. Bernard did.

Q How did you know it was slippery?

A I could see the oil on top of the frame and I could see it coming down the sides and the employee indicated that it was leaking and extremely slippery.

Q Does the photograph reflect that?

A Yes, it does.

THE COURT: What are you pointing to?

THE WITNESS: To the right side as I am looking at the photograph.

THE COURT: What are you seeing?

THE WITNESS: The oil on the top of the frame.

Q How do you know that is oil, sir?

A Employee told me.

Q Even though the oil was on the stator frame, or at least what you believe to be oil, did you classify this as

"other"?

A Yes. I believe I did, yes.

Q Does that mean that it is unlikely an injury will occur in your view?

MR. DeBERNARDO: Could you specify the time?

The time of the inspection or now?

Q Let's take at the time of the inspection.

A Where he was at the time, and I did not think it was serious, no.

Q How about some other time?

A I don't know. I would have to see him at that time to see what position he was on the frame itself. When I saw him, he was holding on the drill and standing on the top.

Q Now, Mr. Nead, a further question, how was it that it was unlikely when there was oil all over there, at least in your view, and there was oil all over there, and how was it unlikely that he would fall?

A He was standing on there, and he had ahold of the horizontal drill at the time.

Q All of the time that you were investigating, he was holding onto the drill?

A All the time that I was looking at him.

Q To your knowledge do they always hold onto the drill during that operation?

A I don't know.

Proceed, Mr. Cummings.

Q Mr. Nead, I show you what is labeled OSHA Form 1-C.

A That is correct.

Q Did you make out this form, sir?

A Yes, I did.

Q What is this form for? What do you use it for?

A It is more or less to determine where the Union is involved in the specific area, and who the management officials were contacted, who accompanied you at the inspection, and who was involved in the closing conference, and it also shows that there was interstate commerce, and if I contact other employees, and I put them in here, and when it is numerous employees, I put it on the other form.

Q Is this a synopsis or a summary of what you observed during the inspection, and in the closing conference? Is that a fair statement?

A Not in the entire inspection, no. It is more or less personal and contact, is what it is.

Q I ask you, referring to this document 1-C, Mr. Nead, you evaluate the safety and health program; is that your evaluation of General Electric during the inspection which led to this contest?

A Yes, it is.

Q There are three columns. Would you read these columns? Safety responsibility?

A Effective.

Q The other column is average, and the other column is ineffective?

A Right.

Q The same for employee participation and the employee training?

A Also pertains to the protective equipment and the housekeeping and the first-aid.

Q Now, I am going to ask you three questions. What did you classify safety responsibility of the employer as?

A Effective.

Q How the employee participation?

A Effective.

Q Training?

A Effective.

Q Mr. Nead, in this memorandum, and the reason that I am going through all this, and I understand that I cannot introduce this document into the record, a 10 percent reduction is given for good faith?

A A 10 percent reduction was my recommendation to Mr. Bernard.

MR. CUMMINGS: No further questions at this time, Your Honor.

Let the record show that I returned Forms 1-A and 1-C to Mr. DeBernardo, and would ask their

return to me should he make the motion, any motion to go into the 55 gallon drum issue.

THE COURT: If Mr. DeBernardo would give them to me, and I am going to enter them into the record as Judge's Exhibits, J-1 and J-2, and in the event that we have an appeal, and I want the Court of Appeals to have the benefit of all the documents that this Court has.

(Exhibits J-1 and J-2 marked for identification and received into evidence.)

THE COURT: I have some questions, and my questions may create more questions for you. I want to ask some questions, and at the end of my questioning, we will take a five minute break, and then you may have the right to come back.

MR. CHERTKOV: I have that right, too.

THE COURT: Of course. All parties do.

MR. CHERTKOV: Thank you.

EXAMINATION

BY THE COURT:

Q Mr. Nead, just so that I may clearly understand some things, and that may be perfectly clear to you, and to all Counsel, did you, or did you not, draw the citations in this case?

violation?

A A compliance officer is authorized to set a reasonable date up to and including only 30 days. At the closing conferences of all inspections, the employer is informed that if he needs more than 30 days, he must ask for it in writing to the Area Director, telling him how much of a job has been completed, and how much more is to go, and all the necessary information that he may need to make his judgment. I cannot give him more than 30 days.

Q Now, looking at your C-1, the Judge's Exhibit, could you--

THE COURT: Which one? There are two.

Q J-2, I am sorry. Could you tell us the Corporation officials who were at the closing conference?

A Their names listed down here, as closing conference contacts, are David Guilbault, Milton Rhodes.

Q Are these the individuals that participated in the closing conference through management?

A There were others acting as their representatives for certain areas, and I don't know.

Q What were their job titles?

A David Guilbault is Safety Director and Milton Rhodes, though he has a longer title, we agreed to lower it down to Manager of Environmental Control, because of the lack of space.

Q When you made the comment in your report that the

housekeeping was good, was that just for— was that general for the plant, or did it include any exceptions?

A I did not say that the housekeeping was good in general. First of all, this 1-C was accomplished based on the areas visited. I did make a comment in here that housekeeping program is good, and taking in the overall picture of the two buildings, and I also wrote with the exception of welding area site.

Q Now, at the time that you wrote up this report, and made your recommendations, were you aware of all the previous investigations that had been made at the G.E. Schenectady plant?

A No. Not of all of them.

Q Were these records of previous investigations in your Albany field office?

A I have no records in our office. They are all up at Syracuse.

Q To your knowledge, where was the evaluation as to prior inspections made? Evaluations as to repeated?

A That is determined at the Area.

Q So in effect you couldn't make any decisions at your Albany field office as to prior investigations and repeated violations?

A Had I been on the inspection, on my own, and I would have done one of two things. I would have had all the necessary

information mailed to me, or gone w[illegible]here to get it, whichever would have been necessary. Mr. Bernat[illegible] was running the inspection, and he was the final, and I was to forward it to him, and he was [illegible] do whatever was necessary.

MR. DeBERNARDO: Thank you.

THE COURT: Does that conclude your questioning?

RECROSS EXAMINATION

BY MR. CHERTKOV:

Q Mr. Nead, the Judge's Exhibit J-2 is the Form 1-C that you filled out with regard to this particular inspection. Among other things, you checked that with regard to safety responsibilities, General Electric's program was effective. Would you tell us what you mean by that?

A By "effective", according to the compliance manual, the employer does have a safety representative full time assigned to the plant, performing safety inspections and disseminating safety materials and bulletins.

Q Who are the safety people that you are referring to?

A Well, David Guilbault is one safety representative, and then there are others throughout the plant facility, and names I can't give you.

Q Are there other people in Mr. Guilbault's office or--

A I don't know if they are in his office. I met one gentleman assigned to the Turbine Division, and I don't remember

his name. He was a safety manager.

Q It is possible that there would be other safety people assigned to Mr. Guilbault's office?

A I don't know if they worked directly, and I don't know how the structure operates. There are other safety men in the management team in there, and who they report to, I don't have any way of knowing.

Q You think it is effective, and although you are not sure how it operates? What do you mean by "effective"?

A By "effective", I mean that they have the personnel onboard for the management team and full-time safety and performance inspections of their responsibilities, and also they disseminate materials.

Q Now, who do they disseminate the material to? Do you have any idea?

A Yes. To the employees by means of bulletin board. The normal route, and putting up posters in relation to eye protection, or the foot protection, whatever the case may be.

Q In other words, the safety officials distribute the information directly to the employees?

A That is correct.

Q That is your definition, or description of how this is an effective way to perform their safety responsibilities?

A Yes.

Q Do you know of any situations where safety people,

and that they also disseminated information to their fellow employees.

Q But this form is made out with regard to the employer, is it not?

A Yes. You have got to understand that on the 1-C, and you are making out the back and the back of the 1-C, item 14, evaluation of safety and health, and when you say safety responsibility effective for the management, and you are talking about one specific, and one specific, and as the overall evaluation, derived from the whole of, and putting them all together, and the actual, if you had seen the OSHA 1, and the employer was given an average for an overall safety program and not effective. This is only one part of six, and all of them must be in the effective to get effective, and an overall program, and maybe that is where you are going off a little bit, and in that particular case they had three in the effective block, and one ineffective, and I derived at that ineffective because of the personnel not wearing glasses, and also not supplying the screens or not using the screens, and the second one, housekeeping, and I thought that these two facilities were reasonable, and they were in good condition, with the exception of the large amounts of the arc welding leads on the floors, creating a tripping hazard.

I gave them an average.

The first-aid, I gave them effective, and you arrive

at that from the fact that they have provisions for prompt medical treatment and full-time medical staff on duty.

Taking them all in together, and this overall was average, and not effective.

Q That is very helpful. I appreciate that. I still would like to better understand this particular information here, though.

A Yes.

Q Specifically, I understand your testimony as being that employee participation really relates to the efforts of the Union and its program to have a safety committee and a safety director, but it is unrelated to the effectiveness or the ineffectiveness of the Company's efforts to deal with the Union's safety committee?

MR. CUMMINGS: I am going to object, Your Honor.

In this area I think, number one, Counsel is going beyond the Secretary's complaint, I think, and secondly, I don't see that it is relevant, and third, he refers to the Union, and without testifying, certainly, Counsel knows that there are several Unions down in the Schenectady plant, and on those three bases I object to the question.

MR. DeBERNARDO: All the Secretary could say is Counsel for the Respondent opened up this forum, and the whole form C-2, went into Mr. Nead's evaluation

the jack hammer situation, for example?

A When I wrote it on the back of the 1-C?

Q Yes.

A I was taking into consideration that, plus the other two individuals whom I did not write up, and who did not have their eye protection on.

Q They weren't using jack hammers?

A No.

Q Were they using anything?

A One individual was using a small tool, like a wrench or something.

Q A wrench?

A I don't know exactly what it was.

Q Not a power tool?

A No.

Q Was there adequate warning in both Building 52 and 273, adequate notice, I should say, with regard to the requirements of eye protection?

A Yes, there was.

Q How long did you observe the chipping hammer operation, did you say?

A To break up concrete?

Q Yes.

MR. CUMMINGS: Strike that. May I rephrase the question?

Q The jack hammer operation.

A The actual running of the machine, probably two minutes, and Mr. Guilbault stopped the operation.

Q You were in that area roughly--

A The entire time, probably five or ten minutes, getting and talking to the two people.

Q That was after, and you were in the area after--

A Two minutes prior to the stoppage of the operation.

Q Okay. You were familiar with the compliance operations manual when you made your inspection; is that correct, sir?

A I had a compliance manual, and I use it, yes.

Q Did you also use it to determine the severity of, or a classification, should I say, of a particular alleged violation?

A On that particular case I don't believe that I used the compliance manual, no.

Q One last point on these jack hammer operators. Was there any supervision in the immediate area, that you were aware of?

A No, there was none.

Q "New" means a work area, "new" referring to your 1-A form, means a work area. Don't you consider all of G.E., Schenectady, a work area?

A Yes.

Q At the closing conference, when Guilbault and Rhodes,

you say, were present, and this is on this inspection, that you know is here in question, and there were some other people present, and was one of those people, if you know, a Mr. Richard Werton, Employer's Relations Manager of the Turbine Department?

A I don't know. You would have to ask Mr. Bernard.

Q Did Mr. Guilbault ever tell you his title?

A He told me his complete title one time, I believe, and is too long to put in the little box, and drop it down to Safety Manager.

Q Would you recall whether he told you that he was Division, and that is Large Steam Turbine Division, now known as Steam Turbine Generator Division representative?

A No, I don't remember him actually saying that.

Q You don't remember him saying that he was the plant representative, do you?

A Actually it is just the matter of the way he conducted himself and talked, and I assumed that he was the overall plant safety representative.

Q Mr. Rhodes, do you recall his title at all? Could it have been Turbine Department Safety Man?

A No. It did not have the word "turbine" and I remember, he told it to me, and it was about six words involved in it, and I got Environmental Engineer out of it.

Q You are located in the Albany office; is that correct?

A I am in a field station in Albany.

A I don't really remember seeing any more of that particular type.

Q Did you, to the best of your knowledge, did you see any devices that looked similar to this, that had wheels on them?

A I really can't say if I saw any with wheels or not. I don't remember.

Q So there could have been some that did have wheels?

A There could have been, yes.

Q Did you inspect this to determine whether or not wheels could have been attached to the bottom of this particular scaffold?

MR. CUNNINGS: Objection. Which scaffold are you talking about?

MR. CHERKOV: The one cited in J-1.

THE COURT: Your answer would be confined to the scaffold which formed the basis of the citation in Building 52, Bay A-8, 26 feet 10 inches in height.

A There would be no way for me to determine whether wheels could be affixed unless a mechanical means lifted it, for me to look under. There was no hole going through the top of the bracing which would indicate that there was, and underneath I don't know.

Q In your inspection of this particular scaffold, did

you notice whether there was a means of attaching outriggers--in other words, devices to extend the base of the particular scaffold so as to make it conform to the standard?

A I really don't recall seeing any means. There could have been. I don't know.

MR. CHERTKOV: No further questions.

THE COURT: Gentlemen?

MR. CUMMINGS: One question that I think was opened by that particular exchange, and I would like to pursue it.

RECROSS EXAMINATION

BY MR. CUMMINGS:

Q You determined that it was a violation because you thought it was mobile, a manually propelled, mobile scaffold; is that correct?

A Yes.

Q It violated the 4 times 1 rule; is that right?

A Right.

Q You didn't ride up on this machine, did you?

A No, I did not.

MR. CUMMINGS: Thank you. No further questions.

THE COURT: If there are no further questions, the witness is excused.

MR. CHERTKOV: Just before you do that, I would like

LARRY RAFFERTY, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOTSCH:

Q Can you tell us what your full name is.

A Larry Rafferty.

Q Mr. Rafferty, are you the member of a Union?

A Yes, I am.

Q What Union and Local are you a member of?

A Local 301 of the International Union of Electrical, Radio and Machine Workers.

Q Do you hold any office or position in this Local Union?

A Yes, I do. I am a Union steward, and Executive Board member for the Union, and a Union safety director.

Q Would you explain to the Court how you achieved these positions in the Union?

A I was elected to the Union stewards job in 1967, and within the group within which I work, and in 1971 I was elected by the groups under 30 stewards, 16 buildings, to the position of Executive Board, and in 1972 I was appointed by a unanimous vote of the Executive Board to the position of Safety Director.

Q Mr. Rafferty, have you worked for General Electric Corporation?

A Yes, I have. I have been employed by General Electric

since June of 1965.

Q What is your occupation with General Electric?

A I am currently classified and have been since I have been there as a pipe welder.

Q A pipe welder?

A Yes.

Q Mr. Rafferty, where, in General Electric, have you worked as a pipe welder?

A I normally would be assigned to Building 273. However, I have been loaned out to other buildings, Building 61, Building 304 and other buildings where the same line of work might be held.

Q You are familiar with the operations that are conducted by General Electric at Schenectady?

A Yes, I am.

Q You are also familiar with the operations that have been conducted in Buildings 273 and 52?

A Yes, I am.

Q Now, Mr. Rafferty, could you describe for the Court what operations are conducted by General Electric in Schenectady?

A General Electric, in Schenectady, and in the largest department, the one that we have here today, the Turbine Generator Department, is in the business of making turbine generator units. There are a lot of component parts that go with it. It is castings, molded castings, and a lot of welded work,

assembly, fabrication, and a manufactured unit.

Q Are there any other products manufactured here in Schenectady?

A Yes, there are. There are motors manufactured in Schenectady, and there are certain Chemical Divisions, and Tape Divisions.

Q What operations take place in the Building 273?

A Building 273 is basically the largest turbine building in the plant. In that department there, it is where, basically, the biggest parts of the steam turbine generator units are assembled and built and assembled.

Q How many people are involved in manufacturing these turbine units?

A As I recall, we have about a little over 6,000 people in the Turbine Department.

Q Are any other departments involved in the manufacturing?

A Yes. The Foundry Department would pour the castings, for example, that the Turbine Department would use. Yes, other departments would contribute.

Q How about the Generator Department? Are they involved in the manufacture of these turbines?

A Yes. The Generator is directly involved when the unit is shipped.

Q How many individuals are involved in Building 273?

A To the best of my knowledge, Building 273 has about

3500 people, and this would be salaried and hourly.

Q Now, Mr. Rafferty, could you describe for the Court the physical layout of the Building 273? We have had a lot of discussion as to the various bays in 273, and other locations, and would you describe, for the Court, exactly what the layout of the building is, and how the building is broken down as it has been used in this proceeding?

A Yes. Building 273 is basically 22 acres of machine shop and assembly shop space; down through the building there are bays, which each bay would be a set number of feet wide, and that would go the full length of the building; that would be considered A Bay, and the next bay to it would be B Bay, and so on, right across the building, which would be K, until you reach K Bay, which would be the last.

Then there are columns that are dividers that would separate frame areas through the building. So that, for example, the first hundred feet of the building might be A-1, and the next hundred feet might well be A-2, and they are broken by columns. That is how you arrive at a location.

The Generator Department, much of it is located within the same turbine building-- in other words, I might be a turbine employee, and 10 feet from me works a generator employee for that department, on a similar machine, or an operation, and then, again, would be a turbine employee and it is--

Q Do other types of employees work in Building 273,

besides those two that you mentioned?

A Yes. SU employees, Schenectady Utility operation employees might well work in there at any given time for maintenance, and there might well be steelworkers and millwrights and electricians, from various buildings, that would work in there. Again, as I explained, that I get assigned to other buildings, and other employees would be assigned to Building 273 from different areas.

Q Now, are you familiar with Building 52?

A Yes, I am.

Q Could you describe, briefly, for the Court, the physical layout of Building 52?

A Basically Building 52, I would make an estimate as to the size, the size of a football field. It is separated into two bays. Again, the length of the building, being one side being A Bay, and the other side being B Bay, and separated, again, by the same frames.

It has an annex on it, which might be a room approximately this size, which is known as C Bay.

Q What type of a manufacturing is conducted in the Building 52?

A The same type of operation that is conducted, basically, in the Building 273. It is a weld shop, with assembly work, and some chipping, grinding operations, and stator frames are built in that shop. They are also built in Building 273.

Q We have heard the term "stator frame", used throughout the early part of this hearing. Could you explain to the Court exactly what a stator frame is?

A It is a large housing unit which is used in the-- which is used for the turbine generator units when they ship, and most units, I would say, this large housing would be in the area of 30 to 40 foot in height, and if they were stood vertical, and most would be in the neighborhood of anywhere from 12 to 15 foot on the horizontal. They are basically all of the same type and dimension, and may vary a few feet, one way or the other.

Q What is inside of the stator frame? What is the normal condition of the interior of one of these frames?

A As they progress along, and they start out to be an empty shell. As they progress along, there is various assembly work that takes place inside. Coils that go inside would be wired in. There is certain parts that would be riveted in place, or welded in place. The unit gets assembled to become a--

Q How long does it take to complete work on the stator frame, and what is the end product that is arrived at?

A I think that some of the shop orders, to the best of my recollection, which a unit might start to be built, it may take up to a year to get a complete unit, and the end product would be the turbine generator units which would be used for the power manufacturing. Although units would vary in time,

how long completed, depending on size.

Q How, what are the processes that are performed by employees of the General Electric on a stator frame, stator frame, in order to bring it to the final completion?

A Well, there are varied--

Q As a turbine?

A I believe the plant itself has 1700 different occupations and job descriptions or categories that the hourly employees work in. It could vary anywhere from painting, welding, chipping and grinding, and could vary to assembly work, to intricate machining, boring and tooling, drilling, and it would be a variety of just about any occupation you think of.

Q Now, you stated that you were elected Safety Director of Local 301. What is your experience in the area of occupational safety and health?

A Well, I guess to start back, when I was in the Air Force for three years, and I was directly responsible for weld shop operations, of ground safety and welding operations, and concerned with aircraft.

I was solely responsible for their complete operation, with the 27th Fighter Interception Squadron.

As I went to the General Electric, I was first elected a shop steward, and safety became one of my principal responsibilities, as it is with every steward, and safety is the part of the job in representing the people on the safety.

13,000, close to 13,000, and they have given me this list of people I am to contact in each respective division or department, however you want to break it down.

I believe that 11 of those are located at the main plant complex, and the 4 of those are located at other locations that would vary from, one may be in Scotia, and the other one may be on Campbell Avenue, and I have access to those departments upon the proper notification to the Company, 24 hour notice, minimum.

Q Is there an individual at General Electric that has, in management, that has safety responsibilities?

MR. CUSHINGS: I will object unless he knows.

Q Well, naturally if he knows.

A Mr. David Guilbault has told me that that was his responsibility. I assume his title is Safety Director, Environmental Engineering for the Company, and he told me that he does have that responsibility, and he has met me in various departments, in the plant, and including, say, for example, the Turbine and Generator and Foundry, when we have had Federal inspections into those departments.

Q If you know, what is the extent of the jurisdiction that Mr. Guilbault has?

A I know of no limitation on his jurisdiction. Like I say, just on Federal OSHA inspections, Mr. Guilbault has been on those inspections, and in six buildings and three departments.

these inspections, and at the closing conferences that have--

A He has been present during the course of the inspections, and the closing conferences I am not allowed in on, and I can't fully state who was.

Q Now, Mr. Rafferty, as part of your duties as the Safety Director of Local 301, aside from attending at these Occupational Safety and Health inspections, and what other, what other activity have you been engaged in, in order to lead to a safer work place here in Schenectady?

MR. CUMMINGS: Object, Your Honor, and I don't know the purpose of the question, or the relevance of it.

MR. GOTSCH: Well, I just want to get a little further into Mr. Rafferty's duties as a Safety Director, and what other activities he has been involved in.

THE COURT: I will permit the question.

A I think that what we have done is, within the Union, and we have tried to set up an educational program on safety, and we tried to educate our stewards, and additionally, we have made several attempts, and we tried to establish communications with the Company on safety matter, so that we could have a faster procedure, other than what our contract calls for, the grievance procedures. We tried to-- we have a serious safety problem, and we tried to directly be able to communicate

with somebody on safety, on the Company's side. Much time and much effort has been spent in trying to establish this, so that we could at least sit down and talk, or bring the problems to their attention and discussion and discuss it. As of today, we haven't received anything along those lines.

Much of my activity is concerned there, along with this, and as I review grievance, and discuss the safety problems with the Board members in the particular areas, and, also, we get our own program on how we eliminated hazards, in what area, and how we may eliminate them in another area for suggestions or better design.

Q As the Safety Director of 301, have you conducted inspections of various buildings in General Electric?

A Yes, I have. Upon request, I have conducted several inspections throughout that plant, and various buildings and various departments, for various portions.

Q As part of your duties, as the Safety Director, have you compiled reports based on your inspections?

A Yes, I have. When I make an inspection, I have to compile a full written report, and I submit that report, copies of that report go to our National Safety Director, and to our Local Business Agent, and retained in the office, and I retain a copy; the Executive Board members, at whose request the inspection was made, also receives copies. The Company also receives copies of these reports.

Q What member of the Company management receive these copies?

A It would be the Union Relations personnel, and the management has delegated to me that I cannot deal with their safety people directly, and so they tell me that I have to go to Union Relations people, or the people that are dealing in the interpretation of contract, or on grievance operations.

I present a copy of the list of the alleged violations to management and/or possible hazards or violations of State industrial codes, and whatever it may be, and I present somewhat of a formal list and ask management to meet and discuss it.

Q Do you deal with safety experts in management, or other management officials?

A No, I don't. Although I suspect that some Union Relations people might be, have some knowledge of safety, and thereby no means the safety expert that G.E. says they have, because they employ a full staff of people that are in full-time safety and health operations. These people I am not allowed to communicate with or talk with, nor do they sit in on any discussions that we have on occupational safety and health.

Q Mr. Rafferty, I have several reports here, and in fact, I believe the total number is nine, and I would like you to look at these and identify them for me, if you may.

A You would like me to take these one by one?

Q Yes. Could you identify this first document for me,

report was also presented to Mr. Richard Baker of the Turbine Unit Relations Department.

Q As part of your report to Mr. Baker, I also see attached to the report a copy of minutes of a meeting held on November 6th? Could you identify what is contained in those minutes, please?

A Yes. These are my minutes of a meeting, and I think that you will also find that these, on the other inspections, and on the building 52, and these are strictly Union minutes of a meeting as to who was there from the Union, and who from the Company, and as we met with the Company, and it was the Company's policy to go through these on a 1 by 1 basis. Each violation. Our question, in each case to the Company was, do you agree it is a violation, and do you agree it is a violation, and do you agree, and if you agree, what will be the remedy?

That is more or less our procedure that we follow today, as we go through these.

These are my minutes of the Company meeting. The Company representative would read them from a sheet prepared by himself, and not give us a copy of it. We copied them as they were reading to us.

Q So that this is a transcript, to the best of your recollection, of the subsequent meeting with management officials with respect to your inspection report?

A Yes, it is. These are my records as I took them,

Q Now, Mr. Rafferty, were you present during the inspection that was conducted on March 21st and 22nd, 1973?

A Yes, I was.

Q Could you describe, for the Court, how you were notified of it, that the inspection was to take place?

A I believe I received a phone call at home that morning, somewhere in the neighborhood of 9:00 or 9:30 on March 21st, that the Union Hall had been notified, first, I believe, and the Secretary had called me, because I wasn't at the Union Hall.

It was right around, and I don't know, 9 or 9:30, somewhere in that neighborhood I was notified that Federal inspectors were at the plant, and I was to come down.

Q Did you, therefore, go down to the plant and meet with the inspection party?

A Yes, I did. I called John Keast, my assistant safety director, and asked John Keast to meet me at the plant, and I went down.

Q Where did you go for this inspection?

A The inspection was conducted in Buildings 273 and 52. 52 first and then 273.

Q Who was present-- well, I imagine that there was a prominent group of people there that were present throughout the entire course of the inspection, was there not?

A Yes. Basically Mr. David Guilbault, for the Company

and Mr. Milton Rhodes.

Q What is Mr. Rhodes' title at General Electric, if you know?

A Well, I think that I heard it before, and it is about eight words long, something like Manager of Safety and Health Control Manufacturing-Engineering, or something, and basically his job is safety, full-time.

Q Any other management representatives there throughout the inspection?

A Yes, there were. For example, as we would go into a department, for example, in the Building 52, Mr. Corcoran was present, who was the Superintendent of that area.

Various management representatives joined the inspection at different times, consisting anywhere from various foremen to what, it constantly changed, Mr. Carl Danbury joined us at the one point in the inspection, and he is the generator safety specialist, and Mr. Landrio joined us at one point in the inspection, the manager in the stater frame area.

Q Who was present for the Occupational Safety and Health Administration? What compliance officers?

A Present, Compliance Officer David Bernard and Compliance Officer John Head.

Q As well as yourself and Mr. Keast?

A As I was present on March 21st, and so was Mr. Keast, and on March 22nd, when we were into the Building 273, also

cited the one instance, and at that point the Company representative Mr. Rhodes came up and said, "Look, you don't have to recite it, and I understand that you told us one instance applies, and we recognize that as another instance."

Mr. Bernard, and we could have kept pointing them out around the building, and I did point them out to the compliance officers.

The Company did agree that we didn't have to keep pointing them out, and it was another instance of the same thing.

THE COURT: I would like to have a conference with the three attorneys, at this point.

One of the problems that is bothering me about the repeat violations, is the repeated employee generated violation.

For instance, I can visualize a particular type of an employee, who, because the word is flashed that OSHA inspectors have just walked into the main door, quickly strews these hoses all over the floor, and he has got G.E. locked in again, in a repeat violation.

I don't know how this can be developed. Maybe something for your briefs, but this is going to give me trouble.

I think that it is an area of legitimate

concern for Respondent to be victimized by an unscrupulous employee, and it is a possibility that exists. It bothers me. As Mr. Rafferty testified, on this point, the thought comes up, you know, I am wondering about it. Now, I don't know where we go from here, and it may be something that you might touch on in your briefs.

Has this thought occurred to you on this repeated?

MR. GOTSCH: Well, I would say not knowing the history of the matter, and the housekeeping, I think, as Mr. Rafferty probably has brought out on numerous occasions, and on many occasions, where the OSHA inspectors weren't around—

THE COURT: You see, I visualize the two chippers with the glasses, and here comes the inspector, see, we have got them again. I mean, I can see that there are people in this world who would seek to gain an end this way, and I am concerned about that.

MR. CHUMTKOV: You are talking about—

THE COURT: They see the inspector coming, and all they have to do is take their goggles off and they have got a violation.

MR. CHERTKOV: At G.E. they are fired. I mean, that is a great fear. We have a great fear about this case.

THE COURT: Were these men fired?

MR. CUMMINGS: No.

THE COURT: Mr. Rafferty, was anybody fired?

THE WITNESS: They may receive warning notices if it is proved that they haven't got the glasses on. It is the first step.

MR. GOTSCH: I don't think that anybody would do that, because it would go on their record. I understand that they would get four warning notices, and they would be discharged.

MR. CUMMINGS: To my knowledge, they didn't receive the warning notices.

THE COURT: I am concerned, and I make my ultimate decision about the repeated employees, generated.

Gentlemen, we will resume, and you know the concern I have got.

Mr. Gotsch, you continue your examination on the repeated tripping hazard.

MR. GOTSCH: Yes.

BY MR. GOTSCH: (Continuing)

Q Now, Mr. Rafferty, could you just describe, in further

necessary for me to keep pointing out the same instance of the same violation; that Mr. Bernard had already allegedly cited him for one.

Q All right. Mr. Rafferty, I would like you to, and I would like you to tell the Court any earlier reports that you gave management with respect to this particular citation. Would you inform the Court on any other occasions you wrote up this housekeeping problem?

A Yes. I had brought it up on my previous Building 52 inspection, which I just told you.

Q Would that be the one contained on the Exhibit C-17?

A Yes. October 30th. I had met with the Company representative on that, Mr. Richard Baker, on December 8th, and later meetings.

Q What, if anything, did Mr. Baker tell you about the housekeeping problem?

A The first meeting that I had with Mr. Baker, he indicated that he agreed that it was an OSHA violation, and the very last meeting I had with Mr. Baker, he indicated that it was a continuing day-to-day problem.

Q Do you know, of your own knowledge, of any day-to-day program that General Electric has undertaken to cope with this situation?

A Not in that building.

Q When you say "not in that building", have they

injury if the man should fall from that height off that frame.

Additionally, I observed in K-8 two scaffolds that the welders were working on that were without the proper railing around, mid-rails were missing, and on the scaffold, and, again, this, I brought this to the compliance officer's attention.

While we were in the K Bay, I felt that there was a serious hazard that existed here, because the jobs that the welders were working on are preheated to 450 degrees and then partially covered with asbestos paper, and should a man fall against the job, or stumble, or touch the job, and in an uncovered portion, and his first reaction, if he wasn't protected with a glove, or any other area of his arm, would be to back up, and in so backing up, back off the scaffold where the rail wasn't there.

I was also present at K-11, where there is a platform that is used for welding turbine shells. This platform, I have seen it in use several times, in heights of 6, 8, 10 feet, depending on the level where the sub-arc welding is going on.

On that particular day the Union steward, in that area, and for that shift, a man by the name of John Humphrey personally approached me and asked me, would I have the compliance officers please look at that platform that they had to work off from.

On looking at that platform myself, and I saw that

there were no rails around it, in any way, shape or manner. That was completely an open-sided platform. There was provision there, where railings had been on it, at one time, the provisions made for railings to be on it at one time. There were pipes welded off where smaller pipes could drop through the rail.

Pointing this out to Mr. Bernard, Mr. Bernard asked the Company representatives, at that time, Mr. Rhodes was one of them, if they had the proper railings for that particular stand, and Mr. Rhodes got the foreman in the area, Mr. Archenal, and Mr. Bernard asked Mr. Archenal, and Mr. Archenal indicated that they did have railings, and they used them.

Whereupon Mr. Humphrey indicated that they didn't have the railings, and he worked in that area quite an extensive period of time, and he hadn't seen any railings for that particular platform in at least two years.

MR. CUMMINGS: Your Honor, I am going to make a motion to strike that as pure hearsay.

THE COURT: I think I will have to sustain that.

MR. GOTSCH: Well, I don't agree, Your Honor. This was a statement that was made by a representative of General Electric, in full view of all the members of the inspection team, including OSHA inspectors and G.E. management people and Union safety people.

I think that it does have relevance with

respect to the condition that led the OSHA inspectors to recommend the citation.

MR. CUMMINGS: If I may be heard, in a further comment. Humphrey is not a representative of G.E. management. If the Secretary of Labor wishes to prove this, he could bring Mr. Humphrey in.

THE COURT: I would think that you would be better off in bringing Mr. Humphrey in, if you wish to establish that. We have no testimony that this platform had ever been used without railings.

MR. CHERTKOV: In order to prepare subpoenas, what company does Mr. Humphrey work for?

MR. CUMMINGS: He is working for General Electric. The point is, that he was not a member of G.E. management.

Q Was it a management representative that stated that he had not seen the rails used in two years, or was it one of the Union members?

A It was the Union steward in that area.

Q Mr. Rafferty, if you know, is this powered work platform regularly in use?

A Yes. I personally get assigned, as a welder, and I personally have been assigned to the K Bay area to work, and

my classification is welder, shells, and which is A Bay and K Bay, and I have been assigned for hours or days to the K Bay area. I personally welded along that platform and seen welders working up there and they sub-arc. It is used to, more than on occasion. I could say that that could be used extensively for weeks at a time when those type of shells come in, and it may go for a couple of weeks or not be used at all, and it may be used for a couple of weeks, and it is a weld position setup which is a permanent setup for doing shells as they come through on the production line.

Q On the occasions where you saw the employees working on it, was it provided with the standard guardrails?

A No. What it was, the employees had up there at the time that I saw it, and they had welded a piece of angle iron across to the shell that they were working on, and from the platform to the shell, to provide themselves with a temporary guard.

Q Was there a standard guardrail around all open sides of this platform?

A No. It was nothing more than a welder taking a piece of angle iron and tacking it on somewhere, and because that was the protection for him to lean his arm on, and whatever he was doing, and he was standing up there.

Q This standard platform could be elevated to what height?

A Well, again, the foreman said 10 feet that particular morning. The foreman in that work, Archenal. I personally seen it up, and I would have to estimate, it has been over my head, and 6 and 8 feet.

Q Now, getting back to the work platform, 6 feet 10 inches above the surrounding surface of the Bay K-8, would you— I am wondering, on the work platform, are they considered to be permanent work platforms or non-permanent?

MR. CUMMINGS: Objection. I don't know how Mr. Rafferty testifies—

MR. GOTSCH: I think if he knows.

MR. CUMMINGS: Is this his testimony as to his consideration?

THE COURT: That is the question that was asked.

MR. CUMMINGS: I will withdraw the question.

Q If you know, was this a permanent work platform, or a non-permanent platform?

A Well, the elevator platform, it would be able to go up and down, and you put it in any position you want.

Q I am talking to the other, the Bay K-8 work platform, the six feet ten inches in height.

A Well, they aren't fastened to the floor in any way, shape or manner, and they might be built, for example, and we have our own scaffold builders in the plant, that I represent, for example, if I were to get a job, and one of these shells

that I had to work on at a height, I would go to the scaffold callboard and write down that I required a scaffold to be built. The scaffold builders would come over, on the foreman's instruction, and they work for the foreman.

THE COURT: Pardon me. Was your question scaffold, or are you talking about the powered work platform?

MR. GOTSCH: No. I am getting back to the second element of this particular citation, platform 6 feet 10 inches.

THE COURT: Talking about the two platforms?

A These platforms would be built by the scaffold building crews, and they would be built to whatever height the employee needed to work off from. It may stay for a day, or it might stay for a week or a month, depending on the job that you had to do, and how much welding had to go into that particular job, or what the operation was.

Q Are these work platforms considered to be scaffolds?

A That is what I always referred to them as.

Q Now, Mr. Rafferty, on previous occasions did you bring violations of Section 23(c)(1) to the attention of management?

A Yes, I have.

Q Could you inform the Court as to on what occasions these were made known to management?

A Building 95 I had made an inspection on October 16,

1972, and I later met with Mr. Mike Beaver of management, and I brought the condition to his attention, that there were shells of the same type in K Bay, and just in a different building, and that the employees there were working directly off the top of these shells with no scaffolding whatsoever; that condition has not been corrected yet, to my knowledge.

Q Have you brought this to their attention on any other occasion?

A Yes. In Building 60, in D Bay of Building 60, and I made an inspection of all the Building 60 on February 15th and 16th, 1973.

Q That is the Exhibit 23, C-23?

A In a particular area, in D Bay, as I recall, and there were seven instances of scaffolds without proper railings, and without having any, either any top rail or mid-rail or some cases absent both.

Q What was the height of this particular violation?

A There was seven separate instances, and I think that they ranged from the 5 foot height, I think, 12 foot was what the employee told me, and I can't be sure. That is an estimate, the 12 foot.

I did meet with the company on that. I met with the large generator and management personnel, Mr. Chester Sommers, and Mr. Sommers indicated that— you don't want that. The condition still hasn't been corrected in most instances.

Q Now, the problem that was noted by the compliance officer with respect to the horizontal stator frame, which in this case was located in the Bay H-17, you had brought that to the attention of management on an earlier occasion; is that correct?

MR. CUMMINGS: Objection, leading.

THE COURT: What is the basis of the objection?

MR. CUMMINGS: Leading, Your Honor. This is a crucial part. As I said, I haven't made that objection very often, and even though there is quite a bit of it. This is a crucial part of the testimony, and Counsel is leading the witness.

THE COURT: Could you rephrase it, Mr. Gotsch?

MR. GOTSCH: All right.

Q Mr. Rafferty, with respect to the citation for the willful serious violation of Section 23(c)(1), Mr. Bernard and Mr. Head cited General Electric for the failure to provide protection against the falling for the employee working on the 14 foot horizontal stator frame, Bay H-17, and by a means of a standard railing or equivalent. With respect to the particular problem, had you brought this to the attention of General Electric on any previous occasion?

A A similar incident. I believe in 8/16, I brought an incident of a stator frame to the attention of Mr. Ernie Burger, the manager of Generator Union Relations, and the way

this was done, was through the grievance form.

I am the Executive Board Member in that area, and one of the stewards that is directly responsible to me, Mr. Gary Kingsland had filed a grievance on the first step, and it hadn't been resolved between him and his foreman.

On the second step of the grievance procedure, as the Board men and I went in and met with Mr. Kingsland and Mr. Burger, and there were other people there from the Union and the Company, and we discussed that problem. We didn't get any relief in that situation. The condition still existed.

Q When did these meetings take place, if you remember?

A I would have to check my previous incident file, in order to get the exact date of that grievance. Right after that grievance meeting, I met with Ernie Burger again--

THE COURT: I think, Mr. Rafferty, the answer to the question is, you don't recall.

We are running far afield on the answer.

The answers that call for a simple yes or no.

We are getting into a dissertation.

Q Just generally, with respect to the 23(c)(1) violations, did you bring these situations to the attention of the Occupational Safety and Health Administration?

A Yes.

Q This was prior to the inspection of March 21st and 22nd?

A You mean on previous to this one?

Q Well, I am just wondering whether you brought it to their attention prior to March 21st and 22nd.

A Well, I brought a 23(c)(1) violation, prior to this, on the March 6th inspection with the Federal inspectors.

Q What was that incident?

A That was an open-sided platform, and that was cited by the OSHA compliance officers in Building 61.

Q Were there any other occasions where the Occupational Safety and Health Administration ruled on that particular, or issued citations on that particular violation, if you recall?

A I am not sure that I follow you. Which one are you on now?

Q Do you recall whether the Occupational Safety and Health Administration, other than the March 6th inspection, which was previous to the one in question today, issued a citation on a 23(c)(1) violation?

A In the 1971 inspection that I was on with the compliance officers, and there was a citation issued for open-sided scaffolding. The Union didn't receive copies of the citation at that time. We weren't aware of it. The only place you could see them was in the shop. I don't know if they were particularly cited, and I know it was alleged by OSHA at that time. I don't know if they were cited.

Q Did your minutes of that 1971 closing conference, or

any minutes that you made at that time--

A Well, it was--

Q -- provide you with knowledge of a violation of that?

A Well, it was indicated, at that time by Mr. David Bernard, the compliance officer, that scaffolding was a serious problem. He told the Union and the Company officials were both present at that meeting, and he said that scaffolding was a serious problem, and he explained what the standard was, and he explained how management had to comply with the standard.

Q Do you recall what management officials were present at that time?

A Yes. There was Mr. Case, Mr. Robert Case for the General Electric Company, and there was a Mr. Pete Kobasa and Mr. Jack Ferry for General Electric.

Q They were informed of the problems involved with violations of 23(c)(1)?

A Yes, they were in detail. All of us were at the closing conference. The employer requested the Union and myself and Mr. Keast and Mr. Scott present.

MR. CUMMINGS: May I have the question and answer?

(The last question and answer were read by the Reporter.)

MR. CUMMINGS: I would move to strike the answer.

It is assuming something that is not yet in evidence. That is that this scaffolding problem quote and unquote, discussed by Mr.

Bernard, was a 23(c)(1) problem, and there are a lot of problems that could relate to scaffold.

THE COURT: At what time are you indicating? You mean currently, or the previous occasion?

MR. CUMMINGS: No. The discussion of November of 1971.

THE COURT: The citation contained both items. Two 23(c)(1) violations.

MR. CUMMINGS: Yes, Your Honor, but my point is that the questioning of Mr. Rafferty merely developed that Mr. Bernard pointed out what scaffolding problems were to management, according to Mr. Rafferty's testimony, and that wasn't defined any further.

THE COURT: We have an Exhibit C-1 that says—

MR. CUMMINGS: I am aware of that.

THE COURT: That is in evidence.

MR. CUMMINGS: Yes.

THE COURT: This closing conference was with respect to this citation, wasn't it?

MR. CUMMINGS: I really don't know, sir. I would assume that that was the general discussion, but whether the quote scaffolding problem that was discussed end quote was that, and I don't know.

MR. GOTSCH: Perhaps we could clarify a little.

THE COURT: Just a minute. We have a motion to strike the last answer. Are you going to clarify the answer?

MR. GOTSCH: I don't think that it needs much clarification. We are not stating that-- the management officials at G.E. might have not even been listening, but they were present when certain information was provided.

THE COURT: All right. I will sustain the objection and strike the whole answer. Here is the citation. You could clarify it. That is Exhibit C-1.

Q At the time of the November, 1971 inspection, there was a citation for violation of Section 23(c)(1), and in that a work platform, approximately 25 feet above surrounding surface, on Betts Bar machine, Bay H-8, is without mid-rail and suitable top rail.

Now, was this particular citation discussed at the closing conference after that inspection?

A Yes, it was.

Q Now, what management officials were present at that closing conference?

A Mr. Robert Case, Mr. Jack Ferry and Mr. Pete Kobasa.

Q Who was the compliance officer present?

A The compliance officer was David Bernard.

Q Do you recall what he said with respect to the 23(c)(1) violation?

A Yes, I do. He said that on the scaffolding, down in the center portion of Building 273, there was more than one incident pointed out, as I recall, and that he considered it a serious safety hazard, and that he expected management to come into compliance in all areas, and in all instances, and if they had other instances of the same thing, and that he expected that they would comply, and he explained to all of us, who were at the meeting, and what a standard rail was and the various heights of the rails.

Q Mr. Rafferty, now, with respect to the citation issued on April 13th, and there was a violation alleged of standard 252(b)(4)(ix)(c), and this has to do with the Building 52, Bay A-12, with respect to the arc welding machines, and the lengths of electrode and ground cable with exposed bare conductors.

Could you relate to the Court what you observed with respect to that particular condition?

A At the time of that inspection I observed and discussed with Mr. Bernard, the compliance officer, two leads that were joined together improperly, without any insulation around them, and it was open, and being a welder myself I knew that that condition could be a potential hazard. I brought that to Mr. Bernard's attention.

Q Now, Mr. Rafferty, I was not completely sure, from

been caged, and I did observe the life lines, and they were up the last time that I was there, which was sometime in late April. They did have that.

Q You are aware that the employees are provided with eye protection?

A Yes.

Q Do you know if welding screens have been ordered in 52 or not?

A I don't know.

Q Do you know if the work platforms have been protected in Building 273?

A In Building 273, K-Bay, and I checked that area about four times on one occasion, and I found that there was a similar platform that wasn't protected and on the other three occasions I found proper railing.

Q Do you know if they provided a guardrail for the K-11 powered work platform?

A They welded clips on, pipes with clips on, yes.

Q You made reference, in your direct testimony, to the fact that G.E. had something in its employee newspaper about safety goggles that had been smashed by a broken abrasive wheel, I believe. Does G.E. periodically print safety articles in its employee newspaper?

A Lately it has been ever increasing as I noticed.

Q With respect to the tool that ejected the chisel,

PROCEEDINGS OF JUNE 21, 1973.

APPEARANCES: AS BEFORE

THE COURT: Gentlemen, we will resume the hearing, and I will remind Mr. Rafferty that he is still under oath, and that the Union was about to proceed with its questioning.

Mr. Chertkov?

L A R R Y R A F F E R T Y, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. CHERTKOV:

Q Mr. Rafferty, I just have a couple of questions. I would like to clarify some of the testimony that you gave yesterday.

Let me ask you if you could identify this document.

A Yes.

MR. CUMMINGS: By "this document", could you show Counsel?

A Yes, I can. This is a letter that I wrote, to Mr. Guilbault of General Electric Company, on October 11, 1972.

MR. CHERTKOV: For the record, I have showed the witness a letter from Mr. Rafferty to Mr. Guilbault October 11, 1972.

Q Then when you actually have a meeting with the company, who do you usually meet with?

A The Union Relations manager or the agent appointed for Union Relations.

Q Is it your experience that the Union Relations people are familiar with the safety issues that you wish to raise as a result of your inspection?

A No. The Union Relations people are not familiar with OSHA standards or don't have them at those meetings.

Q Could you give, for the record, some specific examples of a lack of familiarity? In other words, what has occurred that causes you to conclude that Union Relations people are not aware of this?

A I don't believe that on any occasion I ever directly said to the Company, the first time in the meeting, "I bring this hazard to your attention, and do you agree it is a violation or not, or a hazard?" and the Union Relations people have ever answered me one way or the other. Their answer is consistently, "We have to review this. We will get back to you."

This is the line of questioning that they want time to review it, and I don't know who they review it with, and then they say that they will get back to me with the answer.

Q Now, this occurs at the first meeting, after, that you have with the Company, after you make a request to have the meeting?

stand and testify.

MR. CHERTKOV: Let me rephrase the question.

Q Mr. Rafferty, there have been occasions when you have performed an inspection, written a report, submitted that report to the employer, and then asked to meet with the employer with regard to details of that report; you would have a meeting, and then the employer, at least with regard to some of the instances, would tell you that he would have to report back in a period of time after consulting with the safety people; is that correct?

A Yes, that is correct.

Q Now, did you take notes at those meetings that you had with the employer?

A Yes, I did.

Q Those are the notes that were accepted into evidence yesterday; is that correct?

A Yes.

Q Now, did the employer ever provide you with the written report in response to your report?

A Not on any of my official safety inspections that were introduced into evidence, no.

Q Was it your impression that the report had been prepared?

A Yes. In every meeting the Company read off the report to me, and they had their own prepared sheets which I didn't

which they read off the answers to me, and I copied them down, or my assistant John Keast would copy them down.

Q They never offered you a copy of the report?

A No, they did not.

Q Now, as I understand it, it was your testimony yesterday that it was after a series of these efforts to get together with General Electric, and the time delays that occurred, in your efforts to get together with General Electric, that you sent this letter to, which I am showing you now, which has been marked P-3, to Mr. Chester Whiteside, Acting Area Director of OSHA.

Could you identify that letter for the record, please?

A Yes. This is a letter that I wrote on January 17, 1973, to Mr. Chet Whiteside, Acting Area Director of OSHA, of Syracuse, and indicating that the Union had basically a communication problem, and that it was our opinion that the employees were being subjected to unnecessary hazards and unreasonable delays. We desired that the Labor Department do what they could to establish some form of a communication with us, if they would assist.

MR. CHERTKOV: Your Honor, I move that the Exhibit be submitted into evidence.

THE COURT: Mr. Cummings, P-3 for identification?

MR. CUMMINGS: I don't object, Your Honor, on the basis that the letter was written, and if it is

being offered only on that basis, I have no objection.

As to the truth of the contentions, I would object, if that is the purpose of the offering of it. In other words, I think that there should be testimony to that effect.

THE COURT: Would you accept the letter as having been written by Mr. Rafferty in representing Mr. Rafferty's views of the situations?

MR. CUMMINGS: Yes.

THE COURT: Would you offer it for that purpose?

MR. CHERTKOV: Surely.

THE COURT: Mr. Gotsch?

MR. GOTSCH: I think we could accept it on the same basis.

THE COURT: P-3 will be accepted into evidence on the basis discussed.

(Exhibit P-3 received into evidence.)

Q How, to your knowledge, Mr. Rafferty, has the Department of Labor worked with General Electric in order to help them continue in the enforcement of the Occupational Safety and Health Act?

A Yes, they have.

Q Can you, from your personal knowledge, can you cite any situations or examples of the Department of Labor's helping

the General Electric understand this legislation of this Act?

A Yes. Mr. David Bernard, the compliance officer for OSHA, came into the Schenectady General Electric plant on several occasions and conducted classes, or workshops for management personnel, I assume managers, and for foremen, and various safety people and safety staff people, to explain the Act and the employer's rights and what.

THE COURT: I will take official notice that the Labor Department helped all industry in America understand the Occupational Safety and Health Act of 1970, including G.E.

Q At any time, in your dealings with General Electric, did they ever deny the existence of the Act or suggest that they weren't covered by the Act?

MR. CUMMINGS: I am going to object, Your Honor. We will stipulate that we know the Act exists, nor do we question the jurisdiction. I have not raised the jurisdiction issue in my answer. Therefore, it is admitted.

Q Mr. Rafferty, what was Mr. Whiteside's response to your letter of January 17th, which has been introduced as P-3?

A Mr. Whiteside indicated to me that either he or the Regional Administrator was willing to sit down and talk to us about the letter and the problems that we had raised, the issues

that we had raised.

Q The issues that you had raised were the inspections that you had conducted, on several occasions prior to that; is that correct?

A Yes.

Q Now, what was the next event that occurred in terms of sitting down and talking with you, and what was the results of those conversations?

A Myself, the National Safety Director Jack Sirease, and the Business Agent of Local 301, Mr. Mangino went to New York City and met with Mr. Barden and Mr. Andree in his office, and discussed inspections, previous inspections, and this letter in great detail.

Q Approximately what date was that?

A March 1st of this year.

Q Following that discussion with the Regional Administrator of OSHA, in New York,what happened? What occurred?

A Well, following that discussion-- I don't want to get into hearsay-- but to the best of my knowledge, the OSHA people had contacted General Electric--

MR. CUMMINGS: Object, Your Honor. That is, I don't think that there is any foundation.

THE COURT: Let Mr. Rafferty testify as to what he knows and not what happened between OSHA and G.E.

A To the best of my knowledge, Mr. Barden had contacted

General Electric Company, and in regards to all the issues that the Union had raised, and Mr. Barden--

MR. CUMMINGS: Your Honor, I raise the same objection.

MR. CHERTKOV: Your Honor, if the witness is testifying that Mr. Barden told him that Mr. Barden had called G.E. and asked G.E. to cooperate under the statute, and then that is not hearsay. It is direct evidence, to the knowledge of the witness.

If the witness did not hear that directly from Barden, and then I would rephrase the question.

THE COURT: I will permit him to testify that OSHA contacted G.E., but not what was discussed or decided between them. The Government, I believe, is going to call some of the personnel from the New York office, and you could ask them.

Q This was approximately March 1st?

A March 1st of 1973.

Q It was the inspections that led to the citations that have been issued in this case, were issued on March-- the inspection was conducted on March 21st and 22nd; is that correct?

A Yes, that is correct.

Q Now, to the best of your knowledge, at the time that expired, between your appointment as Safety Director on October 11, 1972, and the first, the inspection that was conducted on March 21st and 22nd, were there still some alleged violations of OSHA that were uncorrected?

A Yes, there were. I had alleged instances to the Company which I felt--

Q Were those instances that caused or created or involved hazards to workers?

A Yes, in my opinion they were definite hazards to the workers.

Q Were these hazards that involved, and could it involve injury or death to the workers?

A In my opinion, yes, and employees have been injured on some of those same conditions previously, to my knowledge.

MR. CUMMINGS: Your Honor, a point of clarification.

Read the question, Mr. Reporter, that prompted that answer.

(The question was read by the Reporter as follows:

Q Now, to the best of your knowledge, at the time that expired, between your appointment as Safety Director on October 11, 1972, and the first, the inspection that was conducted on March 21st and 22nd, were there still some alleged violations of OSHA that were uncorrected?")

Q During questioning yesterday, a question was raised by Judge Chaplin regarding the nature of eyeglasses and safety glasses used in the areas where they were welding. I understand that you brought with you this morning an example of a safety glass that is tinted. Do you have that with you?

A Yes, I do.

Q Could you please show it to the Court?

A Yes.

MR. CHERTKOV: Let the record show that Mr. Rafferty is holding up a typical safety glass with side shields, tinted glass, as opposed to plain glass.

THE COURT: What are you going to do with it? Are you going to offer it?

MR. CHERTKOV: Just show it.

Q Mr. Rafferty, what is the tint of that glass?

A That is a shade 2 filter lens, shade 2.

Q What is the shade of the average sunglass, the sunglasses that the average people use in this country?

A Most are shade 1, and some are shade 2, if you want it darker. That is a darker.

THE COURT: Have we qualified Mr. Rafferty as an expert in sunglasses?

MR. CHERTKOV: Just one or more questions, Your Honor.

THE COURT: I mean, we are going far afield.

MR. CHERTKOV: The question was very specifically raised yesterday about the kind of safety glasses, that were worn by the employees in the area where there was a possibility of welding flashes.

THE COURT: It was adequately answered yesterday.

MR. CHERTKOV: I thought perhaps bringing in the actual exhibit would be helpful.

I would, Your Honor, I would like, at this time, to make my offer of proof with regard to violation of 29(a)(3)(i), the so-called mobile scaffold.

THE COURT: Proceed.

Q Mr. Rafferty, you testified yesterday that you were on the inspection team that, on March 21st and 22nd, conducted an inspection of the Building 52, in 1973, at General Electric headquarters, in Schenectady; is that correct?

A That is correct.

Q During the course of that investigation, were you with the inspectors when they found, in Building 52, Bay A-8, a situation that caused them to issue a citation for serious violation, that I show you now, and that has already been introduced-- that is already a part of the record?

A Yes. That is correct. I was present at A-8, and I observed that.

Q Could you tell, for the record, what you observed at

CROSS EXAMINATION

BY MR. CUMMINGS:

Q Mr. Rafferty, do you realize that it is apparently the position of OSHA that the Company is responsible when employees don't use safety devices and even though they are furnished by the Company: Are you aware of that, that that is OSHA's position, or do you agree that that is the OSHA position?

A Yes, I understand it.

Q Are you aware of the problem that that creates for the Company, when they do furnish safety devices to workers, such as safety glasses, and those glasses aren't worn, and would you agree that that is a problem?

A I agree that that would be a problem.

Q Would you say that that problem is very extensive in the two buildings that were inspected on March 21st and 22nd, or would you say-- I am specifically speaking to the safety glasses-- or would you say that the safety glass rule is generally observed in those two buildings?

A I would say that the safety glass rule is observed in those buildings.

Q Have you ever, in your inspections, seen the rule unobserved?

A Have I ever seen the rule unobserved?

Q Yes, the rule, vis-a-vis, safety glass and the wearing

thereof?

A Yes, I have on occasion.

Q What do you, as a Union representative, do if you see that?

A Ask the guy to put his glasses on, if he doesn't have them on.

Q Does the Union, to your knowledge, have any power to fine or discipline people for, your people who are members of your Union, for not following the Company rules?

MR. CHERTKOV: Objection.

THE COURT: What is the basis of your objection?

MR. CHERTKOV: There is none of the citations here specifically relate to Union misconduct under this law, and the Union fines under this law--

THE COURT: The citations do bear on Union employees disobeying the law, and I will permit the answer.

A Could I have the question again?

Q Yes. In your view, can the Union fine, or does the Union-- let me rephrase it.

Does the Union fine or otherwise discipline its members, when it finds them violating clearly promulgated Company rules, such as the safety glass rules, specifically?

A The Union could fine for Union violations only, and it cannot fine for any Company violations.

Q The Company rule is a Company rule as you see it?

MR. CUMMINGS: Yes.

THE COURT: Mr. Gotsch, do you object?

MR. GOTSCH: Well, I object due to the fact that it was not brought out in Mr. Rafferty's previous testimony, that he observed anything with respect to those glasses.

MR. CUMMINGS: I would be willing to ask the question.

THE COURT: Mr. Chertkov? You don't have to object, if you don't wish.

MR. CHERTKOV: My position, and I do want to state my position, for the record, and I think it is very important, and the Union has nothing to hide, Your Honor. We want to see employees protected, and in terms of injuries and death.

I think that Mr. Rafferty can answer any question, and the fact that the General Electric wants to pursue this line of questioning shows particularly in view of Mr. Rafferty's previous testimony that there are very strong regulations at that plant regarding the safety glasses, and something that the Union could take great pride in.

THE COURT: I am going to overrule your objection, Mr. Gotsch, and we have given Mr. Chertkov great latitude in his examination of Mr. Rafferty, and

going beyond the direct, and I will accord the same privilege to the General Electric.

Proceed, Mr. Cummings.

Q When you were on this inspection, which spanned two days, the 21st and the 22nd of March, were you in the area which was alleged to be in the citation, around K-13 in Building 273?

A Yes, I was. I was around that K-13.

Q Were you present when the citation quoting 133(a)(1), for failure to wear eye protection, were you present when that issue was discussed?

A When it was discussed? Yes, I was.

Q Did you arrive on the scene with Mr. Bernard, and "by the scene", I mean that particular scene, the K-13?

A I was with the inspection party, and I think that we all arrived somewhat within the same thing, and it was the matter that we were walking through K Bay, and we had no particular desire to stop at K-13, and we were on our way to the K-8 area, and we were coming from K-17 to K-8.

Q When you arrived at that area, were there any employees, either of those two employees that I heard named, using the jack hammer?

A Yes, there were. The same two employees, and I don't know which employee was using the jack hammer.

Q Right.

observed him.

Q One of the employees did not have glasses when you observed him?

A That is correct.

Q Did the other one?

A I don't know at the time, because Mr. Nead and Mr. Keast stayed, and interviewed the employees, and they got them in a huddle, and I think Mr. Nead was interviewing the employees at that time, and I had the Union steward that was Mr. Humphrey there, that wanted me to come up and look at the K-11 elevator, and he was talking to me at the same time. I did observe-- I can't be sure which employee was standing there with no glasses on, talking with the compliance officers.

Q Was he operating the jack hammer at that point, Mr. Rafferty?

A No. The compliance officer was talking with him.

Q Did you observe the operation of the jack hammer?

A I didn't observe the operation of the jack hammer, and I know what they were doing. I mean, they were busting the concrete for a foundation.

Q You didn't observe, at any time, the use of that jack hammer during that inspection; is that correct?

A No, because after we-- we went right on by, after that incident, we went right on by, and I don't know whether the employees went back and used the jack hammer or not.

Q As you were approaching it, is what I am really talking about.

A As we were approaching, I was aware that the employees were over in that area.

Q That is all?

A I don't know exactly what job they were doing, and I know that one had a jack hammer in his hand.

Q You don't know whether the jack hammer was functioning?

A No, I don't. There are several boring mills running at the same time in that area.

Q Just answer the question, please.

Now, it is your testimony, I take it, that it is clearly posted in 273 that safety glasses are to be worn; is that correct?

A Yes, it is. It is posted on all the doors.

Q Did you, when you saw these employees without the safety glasses on that inspection, say anything to them about why don't you have them on, or anything like that, and like you usually do?

A No, I did not. I don't believe that I was the first one to reach them.

Q This is a fairly rare occurrence, would you say, in 273, to see somebody in that area without safety glasses on?

A Without safety glasses?

Q Yes.

A Yes.

Q Do you think that creates a substantial risk for anybody to be running around K-13, K-11 and K-10 without safety glasses?

A I would say definitely, and almost anywhere in the Turbine Department, and there would be a risk without the safety glasses.

Q Mr. Rafferty, I believe that you testified that you sent some letters or something to Mr. Whiteside or Mr. Barden; is that correct? I am not talking now-- I am not talking merely about the 3, is it? I had the impression, from your testimony on direct, that you sent numerous pieces of correspondence to Whiteside and/or Barden; is that correct, sir?

A There was other correspondence.

Q What did you send them? The inspection lists that you made out? Is that the type of a thing that you sent them?

A Yes. They had some of my inspection lists.

Q When would you send them? Let's take one specifically.

MR. CUMMINGS: May I refer to some of the exhibits, Your Honor?

Q Just for example, Mr. Rafferty, I show you C-21, which I believe relates to Building 285. Did you send any of the papers attached to C-21 to either Mr. Barden or Mr. Whiteside or Mr. Bernard or any of the OSHA people, and I would let you look at that exhibit.

A Not that I recall. I don't need to look at it. Not that I recall.

MR. CHERTKOV: What exhibit was it that you just showed him?

MR. CUMMINGS: C-21.

Q How about the C-18, which is Building 61? Did you send him any of that?

A Not that I recall.

Q Let me ask you, and if you remember, which one of these did you send either/or any of the OSHA people?

A Well, you say sent, and some of these I am not sure what you mean by "sent".

Q I was under the impression, Mr. Rafferty, that you sent via U.S. mails some of your lists to OSHA inspectors.

A When I say "sent", and they may have gone by mail or I may have hand delivered them to the Syracuse office.

Q I am encompassing both in the word "sent".

A Now, what is your question?

Q My question, sir, which one of those, or which ones of those did you send, and whatever, to the OSHA people?

A For sure I know, Building 52, is that the first one? I also believe Building 95.

Q You know for sure 52, and that is C-17, is it, sir?

A Yes, that is it.

Q When did you give this to the OSHA people, and what

16th of April; is that correct, sir?

A That would, and making an assumption, that would be correct, because normally I have conversations with OSHA people and interpretation and whatever.

Q Did any of those conversations relate directly or indirectly to any of the citations in the complaint here before us?

A No. I don't believe that I directly discussed anything right here.

Q Are you certain of that?

A I don't know whether it would come up or not, and we discussed similar citations.

Q Similar situations?

A Yes. Other inspections, yes.

Q Other than those discussions, and in those discussions, did you get so specific as to discuss penalty?

A No. I don't recall discussing the penalty.

Q Did you get so specific as to discuss whether or not the violations were serious or willful or repeated-- in other words, the classification of the violations?

MR. CHERTKOV: Objection, Your Honor. This record is absolutely loaded with the fact that this Union has been pressing OSHA to find these violations for the past six months; that we are just going over and over and over

urged in the time frame, sir?

MR. CHERTKOV: I am not sure what the relevance is.

THE COURT: Mr. Cummings is asking you if you would stipulate to something, and whether it is relevant or not, is immaterial.

Will you or won't you stipulate?

MR. GOTSCH: I think that we would object to any stipulation on this particular thing.

THE COURT: The answer is no, then.

MR. CHERTKOV: To the breadth of the question, though, it is ridiculous.

Q Would you answer the question?

A Could I have the question again?

MR. CUMMINGS: Read the question.

(The pending question was read by the Reporter.)

A No, I discussed nothing specifically on specific citations, no. These that you are talking about, these that are in this particular inspection.

Q You are kind of, I think, changing my question.

Did you talk about whether these violations alleged are serious or willful or repeated? That is the question.

A I can't go back and answer you honestly within this time frame. I know I told OSHA people on the occasions, look, we cited this to General Electric on many occasions, and I know that I brought that up, and I felt that everything was willful.

Q Did you urge, on many occasions, as your Counsel suggested, that everything was willful and everything was serious?

A Yes. On most instances, and I said, look, something has to be done, and that is what I said to the OSHA people, that the willfulness and the failure to communicate the--

Q Failure to communicate? Is that what you said?

A Yes. I think most of my meetings, to clarify that, with the OSHA people, have been communication instances, or willfulness on the Company's part,

Q Mr. Rafferty, I believe that you told me-- excuse me, I believe that your testimony is, that Mr. Guilbault went to three different and separate departments, on three different and separate OSHA inspections, and that you can recall; do you recall what those departments were, sir?

A Yes.

Q Would you tell me what departments they were?

A Well, he has been in the Turbine Department.

Q Yes?

A The Generator Department and the Foundry Department.

Q Now, if you know, sir, what divisions are those departments? One division?

A Not that I know of.

Q Okay. You don't know, or are you saying no?

A I know that they aren't, for example, in the Turbine

MR. GOTSCH: That's right. It seems to be a relatively small area, and if we are talking about what is shown in the exhibit, and perhaps Mr. Cummings has a larger area in mind, and that I don't know. I wonder if we could have that point clarified.

MR. CUMMINGS: I am satisfied, Your Honor.

Q Now, Mr. Rafferty, in response to a question asked you, and I believe by His Honor yesterday, the K-11 platform, and I believe the question was, have you ever seen that used without railings. What was your testimony on that point?

A I said yes, I have.

Q Would you please describe the manner in which you say it operates without railings? Was it without railings on one side, up against the work piece, without railings on all sides, and how high did you go, and that kind of a thing.

MR. CUMMINGS: This is, Your Honor, without waiving my objection to the entire line of questioning which went into the previous occurrences.

A Well, I believe that I seen it probably, again, and I don't know the height, and maybe in the 6 to 10 foot height, over my head, anyway.

Q Yes.

A With the welder, with a shell standing in the vertical

position, and welding inside of a shell, and no rails on this open platform, and so what the welder would do, is just grab a piece of angle iron and weld the angle iron to the job, and the welder would more or less use this to lean on or lean against, or use that as a brace on one side.

At the time that I observed it, and I observed it with one side open.

Q Now, you are certain that you have seen things like this--

A Yes, I have. If I could clarify that, and I passed through that area, at least once a day, and I am the Executive Board Member, and I had three stewards in K Bay, right in that area. I have 21 stewards in that building. I contact them almost daily.

Q These temporary rails, or welded rails, they were rails, weren't they? I mean, they are rails, aren't they?

A No. A piece of angle iron welded to the job, and coming out, you know, so it would meet up against the platform, and the elevator.

Q This was on the top side of the job?

A On the inside of the job.

Q This is on the top side of the platform?

A On one open side, and whichever. The time I saw it, and I would say the guy with the right side.

Q The rest of the platform was enclosed?

A No. The front of the platform would be pushed up against the job.

Q Yes?

A And leave the left side.

Q You don't need any rail for that?

A You don't need any rail on the front-- I don't believe. You would be against the job.

Q What about the other sides?

A The other side was open.

Q There are two more sides.

A No. The back of the elevator there is a side on the back. That is the elevator itself.

Q That is enclosed?

A That is closed.

Q What about the fourth side?

A The back would be closed, and the left side open and the front side against the job.

Q Closed?

A And the right side is where the guy would weld a piece of angle iron and lean on it.

Q Now, doesn't he work next, and isn't the side on which he would weld the angle iron next to the work?

A It would be right over the work, where he welded.

Q Wouldn't the work provide some closure?

A No. You have got to understand that this is a shell.

Q To protect themselves from injury and death; is that correct?

A Yes. If I am a welder, and if I am working a piece, and I don't want to fall, and I don't have any railing around, and I would weld something to try and protect myself, and it is just for a back rest or a back guard.

Q It is not a policy of the Company to provide that weld?

A No.

Q Or that railing?

A No.

MR. CHERTKOV: I have no further questions.

THE COURT: I just want to ask you one or two questions, Mr. Rafferty.

BY THE COURT:

Q Did you discuss the March inspection with OSHA, prior to its issuance of the citation here in issue, or the citations here in issue?

A Yes, I did.

Q That is enough. Just yes. Did you or any member of the party wear safety glasses during this inspection?

A Yes.

Q Did all members of the party wear safety glasses?

A To the best of my knowledge.

A Yes. It is always difficult to walk on top of that frame.

Q Why?

A The slipping hazard and the oil, and whatever is up there, and not being, walking on a flat surface, and it is not like walking on a floor. It is like walking on a ball.

Q Have you ever complained to any management officials of this condition?

A Yes, I have.

Q What was the result?

A The result was, I have told the foreman that the, that I had almost, several times, I have had close calls. I have relayed the situation to the foreman and told him that there was lots of oil and whatever, grease up there, and it was a real slipping hazard up there. I was told to, or I told them that I would not work under those conditions, and something would have to be done.

So naturally, not having any safety belt, or any other safety equipment, the next best thing would be to wash the frame down and get the oil and the sediment off.

Q Did you tell management this prior to March 21, 1973?

A Several times.

Q Do you recall which particular management official, or foreman--

A Well, it could have been several. I have had several

different foremen, and they work different shifts, depending on what time the situation occurred, and would be a different foreman. Offhand, I would say John Sudusky, one, and Roy Medder, two, and Paul Supply, and these are all foremen that I had.

Q These are gentlemen that you told of this particular condition?

A Right.

Q Has there been any other management response to your complaints about working on top of the stator frame?

A None until the inspection.

Q You have been provided with scaffolding on the stator frame?

A On the frame itself? No.

Other than, and in a terminal box, what they call a terminal box, but that is because there is nothing to stand, you're inside the frame now, and there is nothing to stand on there. It is just to give you a walking surface. That is all. It is not on top of the frame. It is in the frame.

You still can-- what I am trying to say is that you can still go off the frame, and there is nothing to keep you there.

Q Have you ever requested scaffolding for this stator frame when it is horizontal?

A Yes. Yes, but this-- but you have to understand,

that the scaffolding is not put on the frame. It is set next to the frame. It is not used as a work platform. The frame is your work platform. The scaffolding there is for moral support, I suppose, because as far as I am concerned, it doesn't help me from falling at all.

Q Where is the scaffolding placed, in using the Exhibit C-13?

A The scaffolding would be put on the outside of the frame, next to the foot, or the foot rail, as they call it.

Q Would you indicate where that is in the picture?

A Yes. [illegible]at is the center of the picture, and at the bottom. It would be the top of the scaffold.

Q Is that where those rows of holes are indicated in the picture, along near the bottom?

A Right. It may, depending, and this is a portable aluminum scaffold that they give us, and when they do give it to us, and it varies in height, because it is not part of this station's equipment. We have to borrow that. If it is— if it is not in use, we get it. If someone else in the area, that it belongs to, and the erection gang is using it, and we don't get it.

THE COURT: Before you proceed, Mr. DeBernardo, for clarification, in the record, are you saying that the ribbed object with four holes between each rib at the bottom of C-13 is a

portable scaffold and not part of the stator?

THE WITNESS: No. That is a part of the stator frame. That is a foot rail, or a foot, what they call a foot. The scaffolding is not in that picture.

MR. DeBERNARDO: This is to indicate where a scaffold is placed at times.

Q Now, is the scaffold retained only on request, or is it normally provided as a part of the job operation?

A You don't get anything unless you request it.

Q Well, do you have to request, to obtain the scaffold?

A Yes. We, like I say, we have none of our own, and so, of course, I have to see the foreman before he will go and ask if he can have the scaffold, or another division, and/or whatever.

Q What if an employee does not ask for a scaffold?

A It would not be provided. This employee will not do the job if it is not there.

Q Who do you mean by "this" employee?

A Me, myself.

Q Do you consider that scaffolding that is provided adequate?

A No. As far as adequate to what effect?

Q Adequate for safety purposes, to protect you.

A No.

Q Why not?

Q Mr. Keast, to your knowledge, have there ever been strikes over exhaustive grievances, where a safety issue was involved?

A Yes, there have.

MR. CHERTKOV: No further questions.

MR. CUMMINGS: Just a couple of quick questions, Your Honor.

CROSS EXAMINATION

BY MR. CUMMINGS:

Q Mr. Keast, is it your testimony that foremen can see almost most of their people, most of the time? Is that your testimony?

A I don't think that— as a general rule, yes, they can. Most of the foremen have, are in the habit of walking up and down the aisle, and they observe their employees.

Q They do this all day long? Is that basically what foremen do, observe their employees?

A No. In performance of their duties, up and down, giving work directions to the different employees and assigning jobs.

Q Do they have offices, Mr. Keast, most foremen?

A No, they don't.

Q Do they have work areas or benches where they do some paper work?

A Yes. They have desks.

Q They do paper work during their on shift time?

A Sometimes.

Q Did you ask the employee in question, who demonstrated the chipping hammer to Mr. Mead, to demonstrate that chipping hammer?

A I did not.

Q Who did, if you know?

A I don't recall.

Q As far as the jack hammer operators, is it not true that those--

MR. CHERTKOV: Objection. This is going beyond direct.

MR. CUMMINGS: No. I would show the connection, Mr. Chertkov. You could move to strike, if you don't see it.

May I proceed, Your Honor?

THE COURT: Proceed.

Q Is it not true that they do not have direct supervision which can see them constantly, and that their supervision is up in usually other areas?

A They are.

THE COURT: You withdraw your objection?

MR. CHERTKOV: Yes.

Q Now, the great majority of the people to whom you

introduced Mr. Mead, and until he made his purpose clear, objected because they knew he was a safety guy, didn't they, of some sort?

A They didn't know who he was. In fact, a couple of people asked what is the Union doing with these guys, they are from the Company, Company inspection. They figured that it was a Company--

Q A Company safety inspection?

A Yes.

Q They didn't want to talk to the Company safety inspectors?

A That's right.

MR. CUMMINGS: No further questions.

THE COURT: Mr. Keast, is a foreman a Union employee or a G.E. management employee?

THE WITNESS: G.E. management employee. He is a member of supervision and does not belong to a Union.

THE COURT: Any further questions of this witness?

RECROSS EXAMINATION

BY MR. CHERTKOV:

Q Mr. Keast, do you know of any situations where an employee was fired for not using or wearing particular safety device?

A Yes, I am.

Q Could you state, for the record, what that situation was?

A It involved an employee in A Bay, and I don't recall his name.

Q What building was that?

A 273. It was in the area that I directly work in. The superintendent, Mr. Connors, was out on the floor, and observed the employee without his safety glasses and walked up to him and told him to put them on.

He told Mr. Connors that "I don't have to wear these God damn things" and threw them on the floor and stomped on them.

Fired him on the spot.

MR. CHERTKOV: I have no further questions.

THE COURT: The witness may step down.

(Witness excused.)

THE COURT: Mr. DeBernardo?

MR. DeBERNARDO: The Secretary calls Mr. David Bernard.

D A V I D B E R N A R D , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DeBERNARDO:

Q Mr. Bernard, by whom are you presently employed?

A Yes, sir, he did.

Q Were there any other Union representatives accompanying you during that inspection, outside of Mr. Rafferty?

A Mr. Keast and various shop stewards at different phases of the inspection.

Q What other compliance officers accompanied you during the course of that inspection?

A Mr. Nead, that is all.

Q Could you recall which management representatives accompanied you during the course of that inspection, and you could look at the Judge's Exhibit 1.

A Mr. Guilbault accompanied me throughout, and Mr. Rhodes, I believe, accompanied me throughout, also.

THE COURT: What do you want? The cover sheet, 1-C?

A At various times there were other employer representatives with us.

Mr. David Guilbault, Safety Director, and Mr. Milton Rhodes, Manager, Environmental Control.

Q What is your understanding as to Mr. Guilbault's authority with G.E. and his position and authority?

A That he has what he describes as area responsibility for General Electric's operations in the Schenectady area, and that he also has a divisional responsibility that covers the entire Turbine Generator Division.

reading of 15 feet 3 inches.

Q Did you take any pictures of those welders?

A Yes, sir, I took one photograph.

Q Would you look at the Exhibit C-5.

A Yes, sir.

Q Is that the picture you took?

A Yes, sir.

Q Now, did you observe any railing on the side of that stator frame?

A No, sir. There were not any railings.

Q Did you observe any safety belt or life lines on the employees?

A No, I did not.

Q Were there any scaffolds around that stator frame?

A It was a device, at each end, which might be construed as a scaffold. There were no devices on the side.

Q Was there any other protective device that might have been equally as effective as a railing or a safety belt or a life line for these employees?

A No, sir, there was nothing.

Q Now, did you make a recommendation that this was a serious or non-serious violation?

MR. DeBERNARDO: I will withdraw the question.

Q In your opinion, was this a serious violation?

A Yes. It is a serious violation.

and Mr. Whiteside instructed me to go to the New York Regional Office to discuss this matter with the Regional Office staff.

Q How, did you in fact do so?

A I did so.

Q Was the meeting in fact held?

A It was held, yes, sir.

Q Approximately what day?

A I believe it was April the 9th, and it was Monday, April the 9th.

Q How, who was at the meeting on April the 9th?

A Mr. Richard Andree, the Assistant Regional Administrator for State and Federal operations, and Mr. Samuel Gorin, Assistant Regional Solicitor, and Mr. Vincent Martucci, and a compliance officer attached to the staff of the Regional Office.

Q Was this the first time that your office ever received a repeat violation?

A No. There was one other instance that I recall.

Q Was this other instance on the same day?

A A few days previous to the--

Q What had you done in the other instance? What action did you take in considering the violation, the repeated one?

A I pointed out to the Area Director that it was an instance of a repeated violation, and I suggested that he request guidance from the Regional Office in this matter, since

our compliance operational manuals does not cover the situation.

Q This in fact was a whole new problem, and you wanted some—

A Yes, sir.

Q Advisement from the Region?

A Yes.

Q Were there any memos or guidelines used at this particular conference?

A Yes.

Q On what is a repeated violation?

A Yes. Mr. Andree produced a draft of some proposed amendments, and the compliance operation manual, dealing with willful or repeated violation, in my compliance manual.

(Exhibit C-27 marked for identification.)

Q Would you identify the Exhibit C-27, marked for identification?

A This is the draft of the proposed changes to the compliance operations manual regarding definition and calculation of proposed penalty for willful repeated or failure to abate.

Q Was this document or set of guidelines used at the conference?

A Yes, it was.

Q Is it a part of the compliance manual?

A Not yet.

Q It is merely a draft?

A Merely a draft. A draft, yes.

Q Why was it, if you know, to your knowledge, why was the draft used?

A We had no other guidelines in the situation.

Q That was the only thing that you had, a draft?

A Yes.

Q Were the procedures for what was a repeated violation, as set out in that directive, were they used at that conference?

A Yes, sir, they were.

Q That basically is, sets what guidelines were followed?

A Yes, sir.

MR. DeBERNARDO: I move that it be accepted into evidence.

THE COURT: Any objection, Mr. Cummings?

MR. CUMMINGS: Your Honor, if the only purpose for it being accepted into evidence is that he followed each and every guideline there, I have no objection.

If it is offered for anything beyond that, of course I would object. I don't necessarily agree that that is within-- that this particular document, which I have never seen before, contains or embraces the statutory definition of repeated or anything of the kind, but on that understanding, I would not object, Your Honor.

MR. DeBERNARDO: Well, Your Honor, none of the compliance

manuals have the power of law. It is merely a guide for the compliance officers.

THE COURT: Mr. Chertkov?

MR. CHERTKOV: No objection.

THE COURT: It will be accepted as representing the thinking of the personnel attending the conference where the repeated and willful violations were discussed.

(Exhibit C-27 received into evidence.)

Q Now, using that guideline, would you tell us something about the tenor of the discussion as to repeated violation? What underlined the thinking of this meeting?

A Well, we, I, we-- we were somewhat quandrious as to how to proceed in this matter, and we used this as the only available guidelines, to help us to produce the decisions that arose out of this conference.

Q Now, what sort of a concept was used, at this meeting, for the concept of repeated?

A If the violation is repeated, and if the violation had occurred before, this would be construed as repeated. In this work place, of course.

Q Now, what did you interpret, or what was the interpretation, at that meeting, as to work place, concerning the G.E. plant?

A The entire plant, whose address is 1 River Road.

Schenectady, New York.

Q That was considered one work place?

A Yes.

Q The fact that they had been cited previously, at this one work place, was considered a violation, or a repeated violation?

A Yes, sir.

Q Now, Mr. Bernard, citation which is Exhibit Number C-3, was at the Nott Street plant?

A Yes.

Q What was the thinking at the meeting as to that fact, that the Nott Street plant is some, maybe two miles away from the River Road plant?

A That the operation of that plant is very closely related to the 1 River Road, and that many of the management people responsible for the operation of that plant of 1 River Road, are also responsible for Nott Street, and that the Safety Director Mr. Guilbault participated in the closing conference at the Nott Street plant, in which this violation was discussed.

Q In other words, you have got an employer that had been put on notice by that fact, the fact that his Safety Director, for both plants, had participated in a discussion of a welding screen violation?

MR. CUMMINGS: I am going to object, Your Honor, as to what, again, is in the employer's mind.

THE COURT: I will sustain that.

Q Let me put it to you this way, then: The fact that Mr. Guilbault had participated in the closing conference, involving weld screens was, in the opinion of that meeting, enough to put G.E. on notice?

A Yes, sir, in our opinion it was.

(Exhibit Number C-28 marked for identification.)

Q Would you identify Exhibit Number 28?

A This is the penalty assessment worksheet for repeated other violations, related to this inspection.

Q Now, looking at, in the left-hand corner of that sheet, there is a category there for good faith, size and history?

A Yes, sir.

Q The document speaks for itself, and did you use the same determination that you stated previously, as to the good faith, size and history?

A The good faith we credited the employer zero.

The size, zero.

The history, zero. The total would be zero, down with the adjustment, and the same reasons that I stated previously.

Q Now, let's to go the gravity of the violation that is marked.

A Yes.

MR. DeBERNARDO: Before I do anything else, let me

move to have this in evidence.

THE COURT: Mr. Cummings?

MR. CUMMINGS: No objection, Your Honor.

THE COURT: Mr. Chertkov?

MR. CHERTKOV: No objection.

THE COURT: It would be admitted as Exhibit C-28.

(Exhibit C-28 received into evidence.)

Q Now, going back to the column 4 of the penalty worksheet for the repeated other violations--

A Yes, sir.

Q Why did you, why $250 for the 22(a)(1) violation?

MR. CUMMINGS: Excuse me, Your Honor. I am going to object on one basis, and it hasn't been established that this man made the-- any of these decisions, and I think until we establish that, we are sort of leaping ahead of time.

THE COURT: You mean on this particular sheet?

MR. CUMMINGS: Yes.

MR. CHERTKOV: I will so stipulate.

THE COURT: Would you ask him if he did it or not?

Q As a result of this conference, did you prepare this worksheet?

A Yes, sir, I did.

THE COURT: Mr. Cummings, you had an objection?

MR. CUMMINGS: Yes.

THE COURT: Do you still have the objection? The witness has testified that he prepared this exhibit.

MR. CUMMINGS: No objection to talking about the exhibit, no, Your Honor.

Q Now, tell me what factors went into the determination for the gravity of the violation 22(a)(1) $250 was the penalty?

A The three factors that we must consider, the extent of the problem, what would occur to the employee if an accident happened, and the severity and the likelihood of injury.

So these were the three factors that went into this, and we determined that it was— it was determined that it was a C category.

Q You mean that you fined $250 would be assessed for this?

A Yes, sir.

Q Now let's go to violation for 157(a)(2).

A Yes.

Q When we use the terminology A, B and C to determine the gravity of the violation, would you briefly explain what you mean by that.

A "Gravity"?

Q No. The A, B and C categories.

A In the form?

Q Yes.

A We have a formula that we used based on likelihood of

injury and severity and extent, and which we use letters, A, B and C, and we take the average of that, and then relate that form to this form, and whatever it falls into, and such as this would be an item 1, would be a low C; that may have been a combination of C, B-C, and these are other valuations of the factors.

THE COURT: Mr. DeBernardo, may I see that exhibit before we get too far?

MR. DeBERNARDO: I ask your indulgence, and this is the first time that we have a repeated violation case, and we have to go into it, in some detail.

THE COURT: We are all in the same boat, so go ahead.

Q Now, this C as used in the terms of gravity means moderate to high severity?

A Moderate to high, yes, sir.

Q Now, for the violation of 157(a)(2)--

A Yes, sir.

Q Was your determination as to-- not your determination-- what was the determination of that meeting, the conference, as to the degree of gravity?

A Likelihood of injury was probably a B. Moderate. The extent was moderate.

Extent was also moderate, and the likelihood of injury-- just a moment. I don't have the form in front of me,

and I am trying to recollect.

The likelihood of injury was not considered hard, and the severity was considered to be possibly moderate, and the extent was also very limited, and it was the only instance that we had, so, therefore—

Q 157(a)(2) is the fire extinguisher violation, isn't it?

A Yes.

Q Now, let's go to item number 3 of the penalty assessment worksheet, and repeated violations, and the 252(e)(2)(iii), which deals with the weld screens.

A Yes.

Q What type of a category did you give for, or I should say, was given for the gravity?

A C.

Q Does [illegible] mean moderate to high gravity?

A Yes.

Q Now, what factors went into categorization of this, as moderate to high gravity violation?

A Well, the extent, the problems and the likelihood of injury, and what would be the severity of it, if an accident occurred, and it might occur.

Q Would you relate as to these factors, as to the weld screens?

A Yes. Ended up to a factor of C. I can't say the exact. I am sorry. I can't remember the exact, whether it was

categorized as a high C. Therefore, a penalty of $500 was proposed.

Q Would you look at the bottom of this penalty assessment worksheet for repeated other violation.

A Yes.

Q Is there a notation at the bottom?

A For above repeat violations, the proposed penalty was multiplied by a factor of 2 items 1 and 3.

Q Now, using the directive, would you explain the rationale of why a factor of 2?

A The first instance of repeat, the draft of the amendment to the compliance operations manual, states that a factor of 2 shall be used.

Q So you multiplied the penalty by 2; is that correct?

A Yes.

Q Is that column number 5 of that sheet the end adjustment column?

A Yes, that is it.

Q Why $100 for the fire extinguisher violation?

A Well, the compliance violation manual states that the repeated violation, for which no previous penalty has been assessed, the minimum penalty will be $100.

Q Let's go to the citation for serious repeated violation.

A Yes.

Q Would you tell us what you observed during the course

of your investigation?

THE COURT: Has he finished with any of the exhibits that he has got?

MR. DeBERNARDO: We are going to be jumping back and forth.

THE COURT: All right.

A Yes, sir. We were, the inspection party is walking down K Bay, and from the higher numbered areas toward the lower. Mr. Rafferty, again exercising his right as the authorized representative of the employees, brought a matter to my attention of two employees operating a jack hammer without suitable eye protection. They were using the hammer to break up the concrete.

Q Were they wearing any type of an eyeglasses at all or what?

A None whatsoever.

Q No protection, no eye protection?

A None.

Q What would have been the proper eye protection for employees using the jack hammer?

MR. CUMMINGS: I think it is on the record already, that we weren't wearing any. That is the testimony. I don't think that we have to go beyond that, Your Honor.

MR. DeBERNARDO: Well, I am sort of thinking, G.E. briefs, when they are--

THE COURT: Let's not worry about G.E.'s brief. We have got a standard that they are accused of violating, and let's stick with the standard.

MR. DeBERNARDO: It does say appropriate eye protection.

Q What would have been appropriate eye protection?

MR. CUMMINGS: Same objection.

THE COURT: The men had nothing on. So "nothing" is equivalent with inappropriate, I assume, wouldn't it be?

MR. DeBERNARDO: All right, Your Honor.

Q Now, what hazard was presented by the operation with the jack hammer?

A Eye injuries from flying pieces of concrete.

Q Did you construe this as a serious violation?

A An eye injury, that would certainly be a serious injury. Therefore, I feel that it would fall within the category of a serious violation.

Q What type of an accident could occur from this type of a condition?

A An eye injury.

Q What factors would have led you to believe that the employer could have known, with reasonable diligence, of the existence of this violation?

A Well, there were, as far as I know, there were only two employees in that work detail, and I think that surely,

when they were assigned to that work detail, they, safety conscious employer would have designated the suitable personal equipment for the hazard, to which they would be exposed, while operating the jack hammer.

Q Were these employees in any way obscured, or were they out in the open?

A No, sir. They were clearly visible to the inspection party from the aisle, down the center of K building.

Q Now, to your knowledge has General Electric ever been cited for failure to have eye protection previously to this citation?

A Yes, sir. It was cited in, on the 2nd of December of 1971.

Q That is Exhibit C-1, I believe?

A Exhibit C-1.

Q What compliance officer made that investigation that resulted in the citation marked C-1?

A I did. I made the inspection.

Q Would you tell us something about circumstances of this previous citation?

A The inspection that resulted in the citation being issued on the 2nd of December, 1971, was a complaint submitted by the authorized representative of the employees that I investigated in late November. Since the complaint alleged a respiratory irritation from a steam cleaning process, and

along with the usual routine of perusing the illness and injury records, I had a particular job or objective to see if there was any evidence to support this allegation of the respiratory irritation.

Well, going through the OSHA 100's, and the log sheet, I noticed that there were numerous eye injuries to employees who were engaged in hazardous occupations.

I asked Mr. Kobasa, who was with me at the time-- Mr. Kobasa was there at the time, and I asked him about it, and he said that everyone in the plant had to wear safety glasses, and it was really, they couldn't put their finger on the problem, and words to that effect, and that was-- so, well, when we conducted the walk-around, and the inspection, and I am going to pay careful attention to this apparent problem. I did so.

In the course of the accident-- excuse me-- the investigation of the alleged health hazard, and I conducted a complete walk-around inspection of Building 273 and Building 61, and I observed numerous employees engaged in eye hazardous occupations, but were utilizing only safety glasses, such as I have, which sometimes referred to as plain nose, and these happen to have a crease in them, but similar to there, and this is what they were utilizing to protect them from--

THE COURT: Have the record reflect the witness refers to his own glasses, which do not have

side protection.

A I cited two instances of employees operating an air hammer and air chipping hammer without suitable eye protection, and an employee operating a hand held light grinding device without suitable eye protection.

Q What is suitable eye protection for a chipper or grinder?

A That is set out in the ANSI standards, Z87.1. Figure 8, the selection chart, recommended eye and face protection, states that grinding, and there were various types of goggles, and safety glasses with close fitting eye cups or side shields for chipping, and it would either be goggles or eye-- wait a minute. Safety glasses with close fitting eye cups, or 75, which are not illustrated, and it mentions 8A, which are not illustrated. However, the selection chart describes 75 as chipping goggles and the eye cup type, clear safety lenses, and not illustrated, and 8A, chipping goggles, cover spec. type, clear safety lenses, not illustrated. Cover spec. type tinted lenses illustrated.

Q Would normal safety glasses be appropriate for chipping and grinding?

A No, they would not.

Q Would normal safety glasses be appropriate for jack hammer operation?

MR. CUMMINGS: Objection, Your Honor.

THE COURT: We have testimony that they weren't using anything. The only question before me is whether using nothing is any kind of a protection.

Q Was a closing conference held for this 1971 investigation?

A Yes, it was.

Q G.E. representatives informed of this safety glass violation?

A Yes, sir, they were.

(Exhibit C-29 marked for identification.)

Q Would you identify C-29?

A C-29 is the penalty assessment worksheet for repeated serious violation, related to the instant inspection.

Q Who prepared that?

A I prepared it.

Q Now, what was the thinking of that meeting held in New York on April the 9th, as to this particular violation?

A There was a repeated violation, and that the seriousness, that was, undoubtedly if the injury occurred, it would cause serious physical harm to the employee, and that the law prescribed penalties up to $1,000 for serious violations, and since it was the first instance of a repeat, a factor of 2 would be applied as per the draft of the amendment to the compliance operation manual.

would certainly be a serious one, and this was the criteria that we used, that an eye injury would be a serious one from this injury.

Q Damage to the eye?

A Yes.

Q What were the factors that went into the determination that the employer could have known, with reasonable diligence, of the existence of this violation?

A Where the employees were operating the hammer, the jack hammer was readily— was highly visible from any one in the area, was one of our considerations.

Q Now, I notice at the bottom of this penalty worksheet there is a notation, and would you read that, where it is marked with the asterisk?

A For above repeated violation, a proposed unadjusted penalty was multiplied by a factor of 2.

Q Now, would you explain that statement, why a factor of 2 for this particular—

A Using the draft, proposed draft— excuse me. The draft of the proposed changes to the compliance operations manual, and it stated that for the first repeat of a violation, the proposed penalty would be multiplied by a factor of 2.

Q Okay.

A This is what we used.

Q What was the proposed penalty for this particular

violation?

A $1,000.

Q You multiplied it by a factor of 2, and what did you get?

A $2,000.

MR. DeBERNARDO: I move that C-29, marked for identification, be accepted into evidence.

MR. CUSHINGS: No objection.

MR. CHERTKOV: No objection.

THE COURT: It would be so admitted as C-29.

Q During the course of your inspection, did you come upon a mobile scaffold?

A I did.

Q Handing you the citation that was issued for that particular violation, now, tell us something of your course, the course of your inspection, as to that particular scaffold.

A The alleged hazard was pointed out to me by Mr. Rafferty, and to make a determination of the height. I rode up and down on it three times, I believe, to take a measurement at the top. Mr. Rhodes went with me.

Q Now, would you describe, in your own words, what this particular scaffold looked like?

A Made of steel, and it was manually operated, and we took the measurements of the base, which I believe they are in our notes.

The least dimension was 5 foot 2 inches, and the height, the greatest height that I rode it up to, is what I measured, the 26 feet 10 inches, and I measured that with a tape, and one side of the platform was unguarded; three sides had what appeared to be a standard railing. One side was unguarded.

THE COURT: Mr. DeBernardo, let's pin the scaffold down as to what particular item you are talking about. There are several scaffolds in the citations.

MR. DeBERNARDO: This is the--

THE COURT: Which standard are we talking about?

MR. DeBERNARDO: 29(a)(3)(i), that was withdrawn by the Secretary-- not withdrawn, but a motion made to withdraw.

MR. CUMMINGS: Which is now alleged as a 5-A-1.

Q Now, looking at the work notes, that were taken of this particular incident, could you give us the dimensions of the other base?

A I don't know where the notes are. All right. I have got it. 11 feet 5 inches at the biggest dimension. 5 foot 2 at its least.

Q Would you describe what the base was like, and what it appeared to you to be?

A Very similar to a cross. The greatest dimension was

the curved surface of the stator frame, to walk out on it, to take a measurement. My recollection is that I did approximation from a ladder, with a tape, and coming down from there I said, I have a, or I feel it is about 14 feet approximation, but if they wanted an exact measurement, and if that wasn't satisfactory, they would have to get a ladder, or some other device, where I could measure it on the end, to get an exact measurement from the top of the stator frame to the floor level. I do not have an exact measurement. It is more of an approximation.

Q Did you climb up the scaffolding?

A I believe that it was the ladder attached to the drill press.

Q Did you climb up to the top of the stator frame in the sense that you were level?

A Yes. Level with it. That is the way— I believe that is the way I did it.

Q You dropped the tape down from what you thought was the top?

A Yes.

Q Was there any standard railing on the top of that stator frame?

A No. There was none.

Q Was there any scaffolding around the sides of that stator frame?

A No, there was not.

Q Was the employee protected with any life line or safety belt or any means of personal protection?

A No, sir, he was not.

Q What was the top of the stator frame like? I mean, what did you observe as to the top of that stator frame?

A Well, it was a curved surface, and there was some liquid on it, which looked like oil, something like-- looked like oil. It was particles of metal there, that is my recollection of it.

Q Was this particular condition discussed at the April 9th conference?

A Yes, it was.

Q Was there any discussion as to the seriousness of this particular condition?

A Yes, there was.

Q What were the factors that went into the consideration that this particular condition could cause death or serious physical harm to the employee?

A It was felt that a fall from a height of approximately 14 feet would result in serious physical harm and possibly even death, and since that fitted a criteria of a serious violation, and it was categorized as such.

Q Was there any discussion, at that April 9th conference, as to whether the employer could know, with reasonable diligence, of the existence of this particular violation?

A Yes, it was discussed.

Q What were the factors that went into that discussion?

A Well, the fact that the operation, this employee worked in an area where he could be readily visible to the supervision, and this was a consideration for this factor.

Q Did you have any trouble observing the employee working on the stator frame from the ground level?

A No, sir. That is where the photograph was taken from, the ground level.

Q Let's go to the second item, willful serious violation, two work platforms.

A Yes.

Q Where did you observe these two work platforms?

A In Bay K-8.

Q Would you tell us, in your own words, what you observed there?

A There were several employees working on the platforms. I believe the primary work there was welding. The platforms, my recollection, were on both sides of the aisle, adjacent to it. One of them, the top rail, as such, was secured with a piece of brass— copper wire, and I pointed out to one of the employer representatives that it was most insecure; that they were lacking in mid-rails, and in most instances, mid-rails were lacking.

Q Would you look at the Exhibit—

THE COURT: They are in order. Number 14. Look at C-14 in the book you have got there.

THE WITNESS: Oh, yes. I have got it, yes.

THE COURT: See if that is the picture you want, Mr. DeBernardo.

MR. DeBERNARDO: Yes, C-14.

Q Who took that picture?

A I took it.

Q Now, would you show us, and would you tell us what that picture depicts?

A Lack of an adequate mid-rail.

Q Is that a picture of one of the platforms that had been cited?

A It is.

Q Now, there is a yellow bar at the right top hand corner of that picture.

A Yes, sir.

Q Is that the top rail or the mid-rail or what?

A I believe that is the top rail.

Q There was no mid-rail for that particular position?

A The chain, I believe, was intended to serve that purpose. I considered it to be inadequate.

Q There is a chain indicated on the other side of the platform; is that correct?

A Yes.

Q Go to the third item, the willful serious violation.

A Yes.

Q Tell us about the powered work platform, and where it was located.

A It was located in Bay K-11.

Q What building?

A In Building 273.

Q Would you tell us about the incident, what you observed as to this particular condition?

A The hazard was pointed out to me by Mr. Rafferty, and since it was not— this was a powered work platform, and without any guarding on what appeared to be the platform, where the employee would work from, and I inquired of the management representative as to where the railing was, and they said wait a moment, and we would get the foreman for this area.

So the foreman came up and I asked him where the railing was. He said that he had only been there about four months, and he could not recall seeing it. So I pointed out to the management representatives, since it was no in use, the railing was missing, that if they could produce it, then that would be sufficient for me. If they couldn't produce it, and I would have to construe it as a violation.

They said wait, we will get the other foreman that used to be here. When he came, I asked him for it. He said that he hadn't seen it in years.

Q Seen what in years?

A Seen the guardrails which was up, of the mountable type or the portable type that could be removed from the sockets.

Q Was there anything on the platform that led you to believe that standard railings could be installed on this particular work platform?

A Yes. There were sockets around the perimeter of the platform that appeared to be sockets for railings.

Q Now, you stated that it was not in use. You mean not in use at the time of your inspection?

A Not in use at the time of the inspection.

Q Now, was there anything that led you to believe that this particular machinery was available for the use of employees in general?

A It was indicated to me that it was available for use by the employees.

Q Who said that?

A It was a general discussion, and I am not sure who made the statement.

Q Was this particular piece of machinery put off to the side in any manner, or was it out in the—

A No. No. It was out in the work area. I forget what it was called, but it was definitely there in the work area.

Q Did anyone deny that it was not used?

A No one denied that it was not used.

Q Were any measurements taken as to the height of this particular work platform?

A No. I inquired as to how high it could be raised, and it was about 10 feet.

Q Did you ask the foreman?

A I believe it was the foreman that I asked.

Q Was this particular condition discussed at the April 9th conference?

A Yes, sir, it was.

Q Was a determination or recommendation made, at that April 9th conference, as to the seriousness of this particular condition?

A Yes, sir, it was.

Q What factors were discussed as to whether this particular condition could cause death or serious injury?

A The factor, falling from a height of approximately 10 feet, and could certainly result in serious physical harm and possibly even death. This fitted the criteria of a serious violation, and it was categorized as such.

Q What were the factors that were discussed at that April 9th conference as to whether the employer could have known, with reasonable diligence, of the existence of this condition?

A Well, it was in the area which would be, if I remember correctly, it was right and adjacent to some offices, used by

supervision, and I think even the foreman, and I think were the foremen's offices, although I am not sure. It was adjacent to the aisle. It could have been readily visible to the supervision. Yes, it was readily visible to the supervision.

(Exhibit C-30 marked for identification.)

Q Would you identify the C-30, if you can?

A It is two penalty assessment worksheets for willful serious violation.

Q Who prepared that document?

A I did.

Q Was that prepared prior to or after the April 9th conference?

A After the April 9th conference.

Q Is that the penalty worksheet for this particular violation that we are discussing right now, the 23(c)(1) violation?

A It is.

Q Now, in terms of the research that you have done, as to this violation, and as to your own personal knowledge, what are the factors that indicated to you that this was a willful violation?

A The employer had been cited on, on or about the 12th of March.

Q What year?

A Of 1973, and been cited for this on December the 2nd, 1971.

Q Who was the compliance officer that made the inspection that gave rise to the citation that was issued on December 2, 1971?

A I was the compliance officer.

Q Now, could you tell us about that '71 inspection, as it related to open sided platforms?

A That there were several instances, and I would have to consult the record as to how many I cited in this, and there were several instances, numerous others that were brought to the attention of the management. At the commencement of the inspection, 1971, it appeared that there would be numerous instances of various violations, and I stipulated to them, at the time, that I would cite one or two instances, and while pointing out others to them, or leaving it to their ability to find out where others existed; that they should correct all such conditions throughout the work place.

Q Would you look at the Exhibit C-1, the December, '71 citation?

A Yes, sir. In relation to—

Q Relating to 23(e)(1).

A Yes.

Q What building was that inspection conducted in?

A Conducted in Building 273 and 61.

Q Were any of these conditions that you observed in December of '71, I should say, in your inspection that gave

of his inspection.

THE COURT: Are you then going to establish that such knowledge would be relevant to him?

MR. DeBERNARDO: It was relevant to our determination that it was a willful violation. I mean, obviously you have the best evidence rule, and that is why Mr. Rafferty was here, to discuss his, you know, his discussions with management, as to these various violations.

I certainly think that the record should indicate that at the time that the Secretary made his determination, that this was a willful violation, and the Secretary was aware of some Union-Management discussions as to the perimeter guarding in the standard railing.

THE COURT: Do you want to comment on Mr. Cummings' objection, Mr. Chertkov?

MR. CHERTKOV: I think, in addition to the Solicitor's position that it clearly, Mr. Bernard has the responsibility as OSHA compliance officer to know what discussions have gone on between the Union and Management and between G.E. and the Union, and the Company, and that the nature of the development with regard to safety and health of workers, and the willingness, or the ability of the parties

A Yes, I was.

Q Was willfulness discussed at the April 9th conference?

A Yes, it was.

Q Would you tell us what factors were discussed at that April 9th conference, that led to the issuance of the willful serious violation?

A It was clearly the third citation that would be issued for the-- the second citation in a matter of weeks, for 23(c)(1), and the fact that the matter had been brought to the attention of the management by the Union.

Q Now, looking at the C-30 for identification--

A C what?

Q 30.

A Oh?

Q Penalty worksheet.

A Yes.

Q Now, you stated in testimony that this was the penalty worksheet that was used to calculate the penalty, as to the willful violation?

A Yes.

Q Now, how was the unadjusted penalty arrived at?

A Well, the unadjusted penalty for serious violation is $1,000.

Q Was any credit given for good faith?

A It was not.

you generally applied the zero rebate, zero size and zero history; is that correct?

A Yes, we did.

Q Now, what was the penalty assessed for all the non-serious violations?

A After adjustment for, well, before adjustment it was $400, and after adjustment, for abatement credits, it was $200.

Q Was a closing conference held after the investigation?

A Oh, yes.

Q Could you tell us who was present at the closing conference?

A Mr. Guilbault, Mr. Rhodes, Mr. O'Connor and Mr. Schultz, Theodore Schultz, and I believe that there were two other gentlemen present, and I cannot recollect their names.

Q Were the Union representatives present?

A No, sir, they were not.

Q Was Mr. Mead present?

A Mr. Mead was present, yes.

Q Now, is this the same Mr. Guilbault that we have been referring to throughout this record?

A Yes, it is.

Q The safety representative?

A Yes.

Q Was there any discussion as to the abatement period at the closing conference?

what was the tenor.

MR. DeBERNARDO: Well, if the witness could understand the question.

THE COURT: Do you want to comment on Mr. Cummings' objection?

MR. CHERTKOV: Was the objection raised in terms of lack of specificity, and I would be more specific.

THE COURT: He said that the witness couldn't comment on what was in the minds of G.E., or the people who participated in the closing conference.

MR. CHERTKOV: The witness participated at the conference, and I would think that he ought to tell the Court the extent to which General Electric was responsive to the allegations that were made, and the extent to which General Electric offered to abate any of thesituations, and the extent to which General Electric had knowledge of the alleged--

THE COURT: That is a whole series of new questions.

Do you want to rephrase the question?

MR. CHERTKOV: I will get more specific, Your Honor.

THE COURT: Please do.

Q At the closing conferences, Mr. Bernard, were you satisfied with the response of G.E. to the various situations that you brought to their attention?

A Yes, I was.

Q Were you satisfied that G.E., at that time, understood that violations, that the alleged violations would apply to more than the one specific incident that may have been charged?

MR. CUMMINGS: Objection, Your Honor. He is asking for testimony as to what was on G.E.'s mind, and I don't think that this witness could answer this kind of a question.

THE COURT: In this instance, Mr. Cummings, I won't sustain your objection. He asked the witness if he felt that G.E. understood that the violations applied to more than the cited item.

You may answer.

A Yes, I did.

Q You reached this conclusion after you had advised and apprised the General Electric Company of their obligation to abate violations as appropriate, more than just the specific incident?

A Yes, I did.

Q Did you find, in your conversations with General Electric at the seminars, that you conducted, as well as during the closing conferences, that they had trained safety personnel to deal with the problems of Occupational Safety and Health?

A Yes, I did.

Q Did you ever have occasion to speak with these safety experts yourself?

A On numerous occasions, yes.

Q It is your testimony that they had knowledge of all the standards?

A Yes, they did.

Q Did you know if the authorized employee representative, or in this case, the Union representative, had knowledge, or the employees involved at G.E. had knowledge of the Act?

A Yes.

Q Of the standards that promulgated under that Act?

A Yes, they do.

Q In your opinion, do you believe that the employee representatives, specifically the Union Safety Committee, were capable of identifying violations under the standards?

A Yes, I think they are.

Q What reasons do you have for that opinion?

A Well, either Mr. Rafferty or Mr. Keast will frequently call the Syracuse Area Office for interpretation of standards. They appear to me to have a good knowledge of the standards, and their application, and I have delivered a series of speaking engagements at the Union Hall in March, and I think it was March of '72, and to several hundred of their members, and the Safety Committee included, and I think that they have a good knowledge of the standards.

Q Did General Electric ever call the office with regard to standards, in their interpretation?

A Oh, yes. Yes. They did. They have.

Q Can you tell, state for the record, for what reason you take pictures when you conduct walk-around inspections?

A We are instructed to do so by our compliance operations manual, chapter 5, page 20, instructs us to do so, to support the allegations of the violations, and also the degree to which the violation may exist, and, also, for establishing hazards not covered by the standards.

These are some of the reasons we are instructed to do so.

Q You take those pictures at the time of your inspection?

A Yes, we do.

Q Do you know if photographs are otherwise permitted inside the General Electric facility, to the best of your knowledge?

A I do not.

Q Mr. Bernard, I would like to call to your attention Exhibit C-14.

A Right.

Q In the very center of this particular exhibit, center of the picture, is some white material.

A Yes.

Q Could you identify what that white material is?

A It appears to be the-- what is characterized as asbestos paper that is used to shield the employees from the

heat of the castings, and that is what it looks like.

Q Is the heat actually found at that particular location? Does it got hot at that place on the castings?

A It might. I don't know for sure.

Q Do you know what the temperature might be?

A I have been told that the temperature of the castings is approximately 400 degrees.

Q Is that at or near a place where employees are working?

A Yes.

Q Is it possible that additional hazard of working at a site, like that, is, the exposure to heat--

MR. CUMMINGS: Object, Your Honor. I don't believe that that is charged in the complaint. I don't understand the relevance of that question, therefore.

MR. DeBERNARDO: Your Honor, it is relevant to the issue of gravity of the violation. The more hazards the employees are exposed to by a particular violation, the greater the gravity.

THE COURT: Mr. Chertkov?

MR. CHERTKOV: I think that it is relevant to any number of issues raised in this proceeding.

THE COURT: I will permit it as going to the gravity of the violation, and we had earlier testimony from another witness that there was a temperature rise to 450 degrees where certain

he hasn't finished.

MR. CUMMINGS: I will withdraw the question.

THE COURT: Let's give the witness time to fully answer. Proceed, now.

Q Yes?

A I would say that I almost fell off the ladder, and I was somewhat shaken by it, but it did not occur to me, at that time, to categorize it as a serious.

Q It didn't occur to you at the time of the meeting, either, of April 9th, correct?

A No.

Q Nor did it occur to, apparently, anyone at the meeting; is that fair to say?

A Yes, sir.

Q How would a person, you know the K-8, what you call the platform, and we call the scaffold --

A Yes.

Q The 6 foot 8 inch device, and how would the person fall off that, again?

A Possibly backwards, out through the missing or the inadequate mid-rail.

Q He would have to be squatting to go through that, wouldn't he?

A Might possibly do so, yes.

Q How else would he go through?

A If I had tripped and fallen, and probably to roll out through there. That would be one way.

Q Was there room, given the situation when you saw it, for someone to trip, fall and roll and go out, on the day that you saw that M-8 platform?

A I would say so, yes.

Q How much room was there between the work piece and the chain mid-rail?

A Oh, if I could look at the Exhibits, and the photos, I could tell you. I think those planks are 2 by 10, which probably about 9 inches.

THE COURT: The witness is looking at the C-14.

A There are four or five planks there. I can't be too sure. Each one, having a nominal width of about 9 inches, it would be, I would say, 5, 45 inches, 3½ feet.

Q There was a toe board there, too, was there not?

A I don't know if there was or wasn't.

Q Looking at the picture, you cannot tell? By that, I mean C-14?

A No. It is not apparent to me.

Q Is that yellow object in the right hand corner of C-14, was that in your view part of this, what you call the platform?

A Yes, I believe that it is the extension of the railing.

Q You are certain that is not part of the welding boom?

Q Did you see anybody else closer?

A No.

Q In your general impression, there was a rule regarding safety glasses, correct?

A Yes, sir.

Q Was that rule pretty well complied with, Mr. Bernard?

A Yes.

Q In point of fact, you kind of commended GE for their compliance of their employees with this rule, right?

A Yes.

Q On this particular inspection, correct?

A I don't recall that I done it on this inspection. I done it on other occasion.

Q The rule is generally complied with down there, is it not?

A Yes, sir, it is.

Q It is properly posted and quite prominently posted in all the buildings that you visited, isn't it?

A Yes, sir, it is.

Q You said at the closing conference, you explained the General Electric's company obligation and responsibility under the Act, and what did you tell them about their obligations and responsibilities?

A Well, it is pretty much a standard procedure, that they have to post the citations, and that their right to contest, and

A Yes.

Q How many inspections have you made of heavy industrial plants, in your career as a safety official, in various capacities? Would you approximate?

A Including shipyards, and which certainly would be construed as heavy industry —

Q Yes.

A Two or three hundred.

Q Do you recall saying that the facilities in Schenectady, of the General Electric Company, were in the top ten percent of all of industry with regard to safety?

A I don't recall saying it.

Q You don't recall saying that at the closing conference, or special meeting with Mr. Brearton, vis-a-vis, the citations in question today?

A I do not recall that particular statement.

Q Do you recall anything like that, sir?

A Somewhere I recall a question like that, and I may have answered in that vein. I cannot put it into the context of which meeting, and at what time.

Q But that the statement, that you will agree, that the statement was made, or one very similar to it?

MR. CHERKOV: Objection. What statement was made?

THE COURT: The statement that he has been talking about, I assume. What statement are you referring

to?

MR. CUMMINGS: Referring to the statement regarding General Electric's relative standing in industry, vis-a-vis, safety.

MR. CHERTKOV: As to what? Schenectady? The specific citations and buildings, or nationwide, or the electrical industry?

MR. CUMMINGS: I believe the witness understands the question.

THE COURT: Do you want to read back the question?

(The following Question was read by the Reporter: "Question: Do you recall saying that the facilities in Schenectady, of the General Electric Company, were in the top ten percent of all of the industry with regard to safety?" "Answer: I don't recall saying it." "Question: You don't recall saying that at the closing conference, or special meeting with Mr. Brearton, vis-a-vis, the citations in question today?")

THE COURT: Do you continue your objection? You objected to Mr. Cummings' last question, because it didn't specify what particular statement we are referring to. We just clarified it on the record.

MR. CHERTKOV: Just so long as it is clear that he is

referring to —

THE COURT: I must ask, if you are going to object, you pay close attention, so that you know what you are objecting to. Otherwise, you are wasting a lot of time here.

Proceed, Mr. Cummings.

Q Could you answer the question?

A I may have made the statement, and I am not sure what content, what time and frame.

Q I am not asking about the time frame. It was — I will get into that in a moment.

A Yes.

Q Did you make the statement or not?

A I believe that I did.

Q Okay. Now, it was made at either the closing conference, or a special meeting with Mr. Brearton; is that correct?

A I have been asked this before, and it has been raised, and my recollection is that it was a question of one of these speaking engagements, a year ago.

Q You don't recall at the closing conference, or a special meeting held subsequent to the closing conference with Mr. Brearton, this point being made again by you?

A I cannot state exactly when I made that.

(A short recess was taken)

THE COURT: Mr. Cummings, you may proceed.

A I did not see an employee on the ladder, no. I saw the employee in cranes.

Q Were there other ways for the employees to get to the cranes, other than the four ladders or the three ladders that we are talking about now in question?

A Yes. I don't know. Other ladders? Is that what you mean, sir?

Q Other ladders or other methods.

A Other ladders, certainly. I don't know about other methods.

Q You said that there was a deficiency in the employer's attitude? I believe that was your previous testimony. What deficiency was that, sir?

A Did I say that?

Q That is my recollection. If you wish to say there was no deficiency in the employer's attitude, let me ask that question: Did you consider that the General Electric Company had a quote deficiency in their attitude, vis-a-vis, safety unquote?

A No. I don't recollect that I said that.

Q You don't consider them to have a bad attitude?

A No, I do not.

Q Do you know how far weld flash is a problem?

A I have no idea of the limits of the radius of hazard.

Q Are you aware of what effects, if any, and in your view, plain industrial case hardened safety glasses would have

on weld flash?

A No, I am not.

Q Have you ever read any literature on this point?

A There is some contention that they will protect a person from exposure to the light.

Q Have you, or any of your associates in OSHA ever done any tests to verify whether or not any of these contentions are correct, to your knowledge?

A None that I know of, no.

Q Is it your testimony, Mr. Bernard, that if an employer violates or is charged with the violation of a Standard, in number, like, let's say 22(a)(1), just for example, and in the past, doesn't contest it, and it becomes a final order; is that correct?

A Yes, sir.

Q Then if you charge him with that violation again, and even though the situation is somewhat different, and as long as, in your view, that same Standard applies, and then you could consider classifying it as a repeat?

A Yes.

Q Or even a willful?

A Yes.

Q How do you get from repeat to willful? What is the, you know, difference?

A The employer had knowledge of the Standard, and that

he was on notice that he violated it previously.

Q Well, let me just ask this: If he were charged with a previous violation, which he failed to contest --

A Yes.

Q -- I guess he would have knowledge of the Standard, would he?

A Yes, he would.

Q How do we get from repeat into willful?

MR. DeBERNARDO: Isn't this sort of a conjecture?

MR. CUMMINGS: I believe his testimony is, Your Honor, he already attempted to explain these differences, and I for one didn't understand them.

THE COURT: I am going to sustain the objection to the question, the way you phrased it.

Q Let me ask you this, Mr. Bernard: What is a repeat violation?

A A repeat violation is a citation for a, a violation that has previously been cited.

Q What is a willful violation, sir?

A The employer has knowledge of a Standard and it has been brought to his attention, and that he is in violation, and that he continues to do so.

Q What is the difference, sir, between repeat and willful, if any?

A The number of times that the violation of the Standard

has been violated and the fact that one of the pertinent factors has been brought to his attention.

Q How must it be brought to his attention, sir?

MR. DeBERNARDO: Objection. Isn't Counsel asking questions that are basically calling for legal conclusions?

MR. CUMMINGS: No. What I am really asking, then, and I would rephrase the question --

Q When you made your input to the committee's decision on April 9th, what did you consider to be the difference between willful and repeated?

A The differences that the employer had been put on notice that he was in violation of the Standards.

Q When you made that decision, how did you consider the employer was put on notice in relation to the three willful citations here in contention?

A I was advised that he, informed, advised one of the other persons, a person participating in the meeting, that the Union had notified the management.

Q What other person so advised you?

A Mr. Richard Andree.

Q Did he advise you how he had that information, and how he came upon that information?

A No, he did not, sir.

Q So in your view, and apparently the view of the

committee, since you spoke for the committee —

A Yes.

Q — here earlier today?

A Yes.

Q The difference between repeat and willful is that the Union, or some employee representative, is involved; is that the difference?

A Yes.

MR. DeBERNARDO: Again, objection. It is calling for a legal conclusion.

MR. CUMMINGS: I am merely asking for the thinking of the committee, and in particular, Mr. Bernard.

THE COURT: We are getting into a very fine line between the decision I am ultimately going to make, and the decision the OSHA inspector had to make in classifying these alleged violations. I am going to permit him to answer it, though, because he had to make the initial decision.

A I was informed that the — they had knowledge that the Union had brought this to the attention of the management, or similar situations to it, and also in view of the fact that they had been cited approximately three weeks before that.

Q In point of fact, you were not informed, I take it, that General Electric had been cited on any kind of a work piece being a platform in the past, had you?

working on top on a product, rather than on a device, such as a machine, that would be made to use --

Q Yes.

A No. The record does not indicate that they were.

Q At the meeting in New York, was there any indication by Mr. Andree that the Union had so advised the employer that it was their opinion that working on top of a device -- on top of a work piece, as opposed to on top of what is clearly a platform, is a violation of the Standard?

A It was -- the working on top of the product would be construed as a violation of the Standard, and there is no consideration as to whether they had been cited previously for working on top of a machine or working on a product.

Q Nor was there any consideration or any discussion, I take it, as to whether or not they had been so advised?

A I did not advise them, but they did have the copies of the previous violations there.

THE COURT: Mr. Cummings, please clarify the specific citation that you are talking about here today.

MR. CUMMINGS: I am talking about Mr. Bernard --

Q The citation which reads --

THE COURT: Give us the number --

MR. CUMMINGS: 23(c)(1), failure to provide protection against falling to an employee working on a 14 foot high horizontal stator frame in Bay H-17,

by means of a standard railing or equivalent.

THE COURT: Charged as a willful serious violation.

MR. CUMMINGS: Yes.

Q Now, my question is, was there any discussion at that April 9th meeting regarding a previous citation having been issued on that kind of a situation involving work, on a work piece?

A No, sir.

Q Was there any discussion of the employer having been advised, by the Union, that the Union considered this a violation?

A There was no discussion on it at that time.

Q Then I take it that it was, as far as you could tell, that because a Standard, and in this case, 23(c)(1) had been violated in the past, and that that fact alone was sufficient to consider it willful when it is repeated?

A That was one of the factors, and not the only one.

Q What are all the rest of them?

A That was the third, the second citation for the same violation within three weeks, and the fact that the employer had been put on notice by the employees and their authorized representatives of similar situations.

Q When that last phrase was discussed, the employer had been put on notice by employee representatives of similar situations, and was there any greater depth than that, in the discussion of April 9, 1973?

714

A That was about the depth of it.

Q The work platforms in the K-8, Mr. Bernard —

A Yes.

Q — were they made of tubular steel, were the outside sections made out of tubular steel?

A Yes, I believe they were.

Q Was the platform section itself made of what is commonly referred to as scaffold lumber?

A Yes.

Q If you know, does GE designate scaffold quality lumber, in some code or fashion?

A I don't know one way or the other.

Q You mentioned two foremen with regard to the K-11 work, powered work platform?

A Yes.

Q One of whom said "I haven't seen railings for four months" and another who said "I haven't seen them —" for what? Two years?

A Years, a couple of years, three years. I don't know.

Q Do you recall the names of those foremen?

A No, I do not, sir. I —

Q Are you certain they were foremen, sir?

A Pardon?

Q Are you certain that those people were foremen?

A I asked one of the management representatives —

Q Was it similar to this tool that we now contend ejects chisels?

A Yes, sir.

Q How about this other device?

A Employee, Bay -- it looks like B, and I am not sure-- D, operating --

Q Whatever?

A Operating handheld light grinding device was without suitable eye protection.

Q Now, what kind of a device was that, sir?

MR. DeBERNARDO: Now, this is a final order. It is not subject to review by any commission, court, and it is written in stone. I mean --

THE COURT: Do you care to comment on that?

MR. CUMMINGS: I am not challenging it as a final order. I am merely trying to demonstrate that the situation in the past had very little similarity, if any, in my view none, to the instant situation.

THE COURT: Do you care to comment?

MR. CHERTKOV: No comment.

THE COURT: Mr. DeBernardo?

MR. DeBERNARDO: The repeated violation is a repeated violation. The instances don't have to be similar. The conditions, I should say. The conditions don't have to be similar, and just as long as the

Standard is. It is a violation of 133(a)(1). That is it. I don't think this Court has the jurisdiction to go into any review of the December 2, 1971 citation.

MR. CHERTKOV: I am going to make one comment, for the record, and I think that we are touching on the gut issue in this case, and you have got a huge employer out here, with a hell of a lot of employees, and if we are going to have to go through and cite ladder by ladder by ladder by ladder, platform by platform by platform, glasses and glasses and glasses and glasses, you know it just makes the Act wholly inoperable.

What we are trying to establish here is a pattern of conduct, you know, in addition to the arguments made by the Solicitor, that we shouldn't go behind the settlement of that particular citation --

THE COURT: This is all fine. Is this in opposition to Mr. Cummings' question, or in opposition to Mr. DeBernardo or --

MR. CHERTKOV: I would support Mr. DeBernardo in opposition to the direction Mr. Cummings is going at.

THE COURT: I am going to overrule both of you, and

sustain Mr. Cummings' right to ask the question, and the very issue that we have, as part of the citations is, what is a repeated violation.

Now, you appreciate the fact that you and the Secretary may have one view, and I also appreciate that Mr. Cummings has the right to have another view, and so we will let him argue his view, if he wishes, and develop it any way that he wishes.

Proceed, Mr. Cummings.

Q Do you recall the question, Mr. Bernard?

A Was it in any way related to these.

Q Was that a jackhammer or anything like it?

A No, sir, it was not.

Q What was the second citation involving 133(a)(1), Exhibit C-1?

A A hand-held grinding device and characterized as light grinding.

Q Was it similar to the device we now contend should have a guard on it? The grinding wheel?

A Somewhat similar to it.

Q Just for the record, did the grinding wheel device that you saw in December of '71 have a guard on it?

A Well, I think that the device, as we were talking about here, are light hand-held devices, for interior grinding.

not a guard on it, and we didn't cite them for that, and we cited them for failure to have adequate eye protection.

THE COURT: I agree. This is the tenor of my remarks to Mr. Cummings.

Proceed, Mr. Cummings.

Q When making the decision that the Company made on April 9th, was there any discussion of the differences in the 133(a)(1) violations in the past, vis-a-vis, the one charged herein?

A No.

Q Now, maybe we could save some time. Is it fair to say that the committee said, in essence, or the discussion was, in essence, look, if they violated that Standard in the past, and that is it, as far as repeat goes?

A This was basically the thinking, yes, correct.

Q The same for willful, given a few additional factors?

A Yes, sir.

Q Looking at C-1, Mr. Bernard, again, were there any 23(c)(1) violations charged there?

A One moment, please. Yes, there were.

Q I see that there were two; is that right, sir?

A Yes, there were two.

Q One was rescinded?

A Yes.

ONLY COPY AVAILABLE

Q Why was that one rescinded, sir?

A Apparently it had been issued in error.

Q The other citation involved a platform 25 feet high; is that correct?

A Yes, sir.

Q That platform was attached to a machine which was attached to the floor; is that not correct, sir?

A Yes, it is.

Q Not only was that lacking in mid-rail, but also lacking suitable top rail?

A Yes, sir.

Q That was fixed after being cited; is that correct, sir?

A I didn't do a follow-up inspection, and I have no way of knowing.

Q Are there any 23(c)(1) violations on C-2, Mr. Bernard?

A No. No, there were not.

Q C-3, Mr. Bernard?

A No, there were not any violations of 23(c)(1).

Q C-4 was mailed by OSHA when, sir, to the employer?

A Probably at March the 12th.

Q Were there any 23(c)(1) violations there?

A Yes, there is.

Q Now, on that, how many were there, sir?

A One. One citing two instances of a weld position platform.

1971, and it is for other 23(c)(1) violations he relied on in determination of willfulness.

HE COURT: I don't think, Mr. Cummings, that you are making a proper connection between the item that you are referring to in December of '71 and the current citation.

MR. CUMMINGS: My only point, Your Honor, is that Mr. Bernard knows what a scaffold is.

THE COURT: I would hope that he does.

If there is no further argument, I am going to sustain Mr. DeBernardo's objection.

Q Now, Mr. Bernard, the K-8, which you called work platform, was not in any way connected to the floor, was it, sir?

A I don't believe it was.

Q Nor was the K-11, so-called platform, was it? The one that was sitting unused?

A I thought that was a permanent device.

Q You thought that it was somehow affixed to the floor?

A Or another structure, yes.

Q The generator stator, that was not affixed to the floor, was it?

A Oh, no.

Q Is it your testimony, sir, that the operators who were using the jackhammer had no safety glasses whatsoever?

A That is my recollection.

Q Are you certain that you observed them when they were actually utilizing this jackhammer?

A I am not sure if it was in operation or it was not.

Q Several of these items that you observed, or some of them, let's put it that way, were not actually in use when you observed them; is that correct?

A Several, yes.

Q Are you aware of the portion of the compliance manual which states, in essence, that working conditions that allegedly violate the OSHA Standard and Health Standards, general duty requirements, shall be cited only when actually observed by a compliance officer?

MR. CHERTNOV: Your Honor, could I have --

MR. CUMMINGS: Referring to Page 10, Chapter 5 and 6 of the compliance manual.

A One moment. Yes.

Q That is the general rule, is that correct, sir?

A Cited when only actually observed.

Q Yes.

A Yes.

Q The exceptions of accident investigations and circumstances where advance notice has been given?

A Yes.

Q Again, this was considered a repeat violation, that eye protection issue, because there had been previous 133(a)(1)

violations, and for no other additional reasons; is that correct?

A Yes, sir.

MR. CUMMINGS: May I approach the bench?

THE COURT: Mr. DeBernardo, Mr. Chertkov?

(A discussion off the record)

THE COURT: Mr. Cummings, you were questioning the witness, and we had the brief interruption to sign the subpoena for you.

You may proceed.

Q On the fire extinguisher situation, Mr. Bernard, how did that happen? How did that come about, that the General Electric was issued a citation in that situation?

A The hazard was pointed out to me by the authorized representative of the employee, and went over there with Mr. Guilbault, and he removed several coils.

Q Just let me interrupt you there. What did you see when the authorized representative pointed out this hazard?

A The fire extinguisher hanging in the corner with several coils of compressed air hose draped over it.

Q Could you tell, from where you were standing, that it was a fire extinguisher?

A Yes.

Q How much of the extinguisher would you say was observable from where you were standing?

A Maybe 50 percent.

ONLY COPY AVAILABLE

tion, and I have a couple of questions, Your Honor, on this point.

Q Mr. Bernard, you don't really consider, or do you, this device a mobile scaffold, do you?

A At the time I thought it was. The discussions I have had since leave me a great deal of uncertainty, and I don't believe that it is.

Q So what factors, or what hazards are we afraid of in this general duty argument? Is it tipping or is it this fourth rail situation?

A As I understand Mr. DeBernardo's argument, now, tipping, and a great deal of swaying, and I went up and down on it two or three times, and it swayed back and forth, from front to back.

Q Now, all large objects sway to some extent, isn't that true? Even tall buildings sway, I am told.

A So I have been told.

Q Was this thing made out of structural steel, as opposed to this tubular scaffolding material?

A It appeared to be made of steel.

Q Any idea of how heavy the base was?

A No.

Q If a crane could knock it over, is it a general duty violation? Is that what we are charged with?

A I don't know.

MR. CHERKOV: Objection. I would like to strike the

THE COURT: There is some confusion in my mind as to exactly how this base was and how these dimensions were.

A The base was 5-2 at its least dimension, and 11-5 at the biggest.

Q It was the sign of a cross or a plus?

A Yes, sir. An exact cross.

Q The long arm was 11 plus?

A Yes, sir.

Q The short arm was 5?

A 5-2, yes.

Q Do you mean that it was 5-2 out from the long arm or it was 5-2 the entire distance passing through the long arm?

A Passing through the long arm is the way I could remember.

Q What do you consider to be the difference between the violation for a serious violation of 252(e)(1)(i) and 23(c)(1), the first paragraph thereof?

A The 252 Standard, it applies only to welders. Welders, burners, helpers. This is why that Standard was used, and it is much more specific than the 23(c)(1).

Q With respect to the third paragraph of 23(c)(1), the powered work platform, did you ask the foreman if the elevator had been used in his four months on the job? You testified that he told you that he hadn't seen the railing in four months. Had

the platform been used in four months?

A I don't recall having asked him that question.

Q Now, I may be getting into trouble with all of you now, and why did you cite this as willful and not repeated?

A The fact that the employer had received a violation for this about ten days before the time of this inspection, and he had received the citation for, alleging the violation of the Standard.

Q You cited him for a willful violation, although the abatement period for the previous one cited had not yet run?

A Yes, sir.

Q You referred to a factor of 5, and Mr. Cummings asked you a question about the rationale behind that, and is the rationale behind that contained in the proposed change in the operations manual? Do you recall?

A There is some mention of it, and I don't know how specific it is.

Q With respect to the pipe that blocked the ability of the foot to go fully into the ladder rung, was the top of that pipe level with the top of the rung?

A No, sir. It was almost tangent to the rung, meaning the middle of the pipe was about even with the rung. I don't think that it was the top.

Q With respect to the ladder which was apparently hit by something and knocked askew, you have referred to a possible

Union?

A He said that he had — he said that the employer had been told. He didn't seem to go into any further any detail on the subject, that I recollect.

Q Who made use of the draft originally? Which member?

A Mr. Andres produced it.

Q Were you familiar with this draft provision previous to this conference?

A No, sir. I never seen it before.

Q For the sake of the record, C-1, going back to the Exhibit C-1 for the previous 23(c)(1) violations, why were they cited non-serious? I mean the ones that you cited in your 1971 citation. Why not serious?

A Well, we were — we did not have a full knowledge of the meaning of the Section 17K, and the definition of a serious violation, and the lack of any guide lines and any guidance in this area, and perhaps an imperfect understanding of it, and probably was one of the things and all of these things.

Q What do you mean "probability"?

A Likelihood of an injury. The amount of exposure. How often it is used. This was one of our considerations and probability.

MR. CUSHING: I think, if I may, that I was not permitted this line of questioning; therefore, I don't see how it is a proper subject for redirect.

ONLY COPY AVAILABLE

Q On the basis of your experience, in the four or five of those buildings, you concluded that they were in the top 10 or 20 percent in terms of the safety program, or were there other factors that you may have been considering in terms of the 10 to 20 percent, and what were they?

A There were other factors in here that would lead me to conclude. The number of professional people on the staff, and the fact that they had a resident industrial hygienist, and their assurance of their intent to comply, and these were things that I felt would put them in that bracket, yes.

MR. CUMMINGS: I would like to have the question and answer read back.

(Last Question and Answer were read by the Reporter)

Q That statement was made in March of this past year?

THE COURT: He already testified several times that he doesn't know when or where he made the statement.

Q Would that be your testimony today?

A I guess I would have to change it.

Q Mr. Bernard, if you were to take it upon yourself, as an OSHA compliance officer, to insure that employees had safe ladders to go up and down, or for whatever reason, at GE, would it be necessary, if GE were to argue that each and every ladder situation presented a special situation, and then as an OSHA compliance officer, would it be necessary to come to the plant on a daily basis to determine the particular, either safe

Stenographic Transcript of Testimony Taken Before Administrative Law Judge Charles K. Chaplin on June 25, 26 and 27, 1973

Your Honor.

Q Now, if a crane carrying one of these large stators hits the wall, would it, or could it damage the wall?

A I believe it could.

MR. CUMMINGS: No further questions.

THE COURT: Mr. Rafferty, I have just one or two questions that occur to me as you were testifying the second time.

BY THE COURT:

Q With respect to the elevator platforms that Mr. Chertkov asked you about, has anyone of these platforms ever tipped or fallen in the GE plant?

A I have been told --

Q No.

A Not to my personal knowledge.

Q You have never seen one tip before?

A I have never personally seen one. I don't work in the building.

Q Now, as a Union representative, what have you been told about other people's experience with these platforms?

A I have been told by Mr. Scott that he has seen the platform knocked over when it was hit by a job. Mr. Scott used to work in Building 52 --

Q That wasn't my question. My question was, have you

ever seen one of these platforms tip or sway, and I am not talking about due to impact. I am talking about due to the sway that you have described earlier.

A Only from my own experience riding up on it.

Q You have not been in one that has tipped over?

A No, I have not.

Q How many people work on these platforms normally?

A One or sometimes two.

Q Would two be the maximum number on the platform?

A I couldn't intelligently answer that.

Q What is the most that you have ever seen on a work platform of the type that we are discussing?

A Well, generally, as far as I know, it is two people are assigned to a team, and two welders, and generally the welders work in a two man team, and this would be the normal.

Q Have you ever seen two people working on one of these?

A Yes, I have.

Q Have you ever seen three people working on one of these?

A No, I haven't, with the exception -- well, that was when they rode up on the test.

Q On the occasion that you rode up on one of these elevators, and it swayed, how many people were on the elevator?

A There were three of us on the elevator.

Q You noticed a sway at that time?

REDIRECT EXAMINATION

BY MR. CHERTKOV:

Q Mr. Rafferty, in your opinion, what is the distinction between a platform and a scaffold?

A I have never really made any real distinction between a platform and a scaffold, because just general shop talk, where I happen to work, and everybody refers to it as a scaffold. We have people that build platforms or scaffolds that refer to it as a scaffold men. That is their job. I think that everything is referred to, that a man works off of, is a scaffold, and that is the general terminology in the shop.

Q So that when you testified with regard to the distinction -- with regard to whether or not there was either a scaffold or a platform in use regarding the, some of these alleged violations, you were not necessarily making reference to specific definitions and terminologies in the standards; is that correct?

A No, I wasn't. I could refer to it either way, and I think that I still do, and even in my inspection reports, and I refer to it either way. The scaffold and the platform, but the shop talk is scaffold.

Q You testified in response to the question from Mr. Cummings that the stator frames are moved by cranes through the shop, through the bays and could hit walls. Could they not also hit ladders?

THE COURT: Have the record reflect the hearing resumed at 10:15.

Mr. Cummings, you may present your witness.

MR. CUMMINGS: Your Honor, at this time the Company would call Mr. Weller.

L E L A N D W E L L E R , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUMMINGS:

Q Mr. Weller, by whom are you employed?

A General Electric.

Q What is your present position with General Electric?

A Superintendent of large machine and erection area of steam turbine.

Q What building is that located in?

A Building 273.

Q What are the duties of your present position, Mr. Weller?

A The overall management of the shop.

Q How many people do you supervise directly?

A Direct reports, nine people.

Q What kind of people are they? What positions?

A These are the production control specialists, a manager of methods and planning, unit managers who then, in turn,

manage smaller segments of the shop, and I have two men who are field installation specialists.

Q To whom do foremen directly report, Mr. Weller?

A To the unit manager.

Q How many people indirectly report to you?

A We have the total complement of about 800 people.

Q As superintendent of 273, are you responsible for the areas involved at K-8 and K-11?

A Yes.

Q Prior to your present position, what was your work background, Mr. Weller?

A I have been on the present assignment for five years. Before that I was superintendent of the bucket shop in the Building 285, for two and a half years.

Q How many years have you worked in total for GE?

A It would be 33 in September.

Q Have you ever worked as an employee, as opposed to a manager in the shop?

A Yes, sir. I served my apprenticeship, and then I worked on the floor for about three years after that.

Q How many years have you either, of those 33 years, how many of those years involved either work in or management of the shop?

A Approximately 25 years.

Q How often, if at all, are you in the shop each day, in

A I would say not. It would normally be snapped into the eye.

Q Which is in the middle?

A Yes. Halfway between the top and the toe board.

Q Mr. Weller, I refer you to the area called out in the Secretary's complaint as K-11, and as I recall the complaint refers to failure to provide a standard railing for powered work platform. There is a serial number 15836, Bay K-11, that could be elevated to a height of ten feet.

Do you recall the piece of equipment to which that citation refers?

A Yes.

Q Would you describe this so-called platform?

A Well, it is a platform with a base, and I would judge four feet wide and six foot long, and that has a telescoping arrangement, so as you raise it, the floor of the platform that you stand on, and a portion of the telescoping arrangement are fixed; so as you raise up, the back raises along with the floor of the platform. Then on the floor of the platform, we have a sliding member that we can telescope out to get closer to our shell than would be possible without having the telescoping floor.

Q Are there any rails, to your knowledge, available for this equipment?

A There are.

Q What kind of rails, Mr. Weller?

A Well, on the right and left hand side of this flooring that the man stands on, we have pieces of pipe that are welded on; then the railing is a removable railing, and this is made of upright posts, and with a flange welded on, so that as you put them in, these pieces of pipe, welded on the sides, and it won't drop down through, and I believe that there are four posts on each side. Between these posts we have chains, again, for the top and the mid-rail, and on those posts.

Q When affixed, to your knowledge, are the chains taut?

A Yes, they are.

Q Is that also true for the platform at K-8, or what we call the scaffold?

A I would believe that it would be.

Q Do the people you supervise utilize this machine?

A Yes.

Q Could you tell us whether or not there are any instructions regarding the use of this machine and the rails therefor?

A In my opinion, everyone knows that we purchased the equipment with the rails, and we used the equipment with the rails, and I know that the people have been instructed to use them and we have had to talk to people about their failure to use the rails.

Q In most instances, to your knowledge, are the rails

used?

A To my knowledge the rails are used.

Q How often would you say that this machine is used, Mr. Weller?

A Probably once a month, but perhaps a little oftener, but somewheres in that neighborhood.

Q Is it used just one day at a time?

A It would be used probably for about three days at a time, and then we will turn around, and change our setup, and go back and run for another two to three days, and then that -- this is for a special application.

So we won't have any more of that work, then, for a period of maybe three to four weeks.

Q Mr. Weller, in your many years of association with the shop environment, have you observed chipping hammers in use?

A Yes.

Q How often would you say, approximately, that you have seen these things used?

A Oh, maybe twenty or thirty times a day.

Q Are they used in your area, sir?

A Yes, sir, they are.

Q Have you ever used one of these chipping hammers?

A I have.

Q Would you describe for us a chipping hammer?

the Nott Street site?

A No. I have a portion of Building 273, and then a portion of Building 320 at Nott Street.

Q What are your safety responsibilities in your job capacity?

A That is so broad, and I really don't know how to answer that.

Q Well, are you in any way responsible for the safety of employees at the building at 273 or the building at the Nott Street plant?

A Yes.

Q Now, tell us what are your safety responsibilities?

A It is my responsibility to run a safe shop.

Q Who reports to you on the safety programs, or the compliance with the safety standards?

A Many people. The unit managers, the foremen, the people on the floor.

Q When you see a violation of a safety standard, what action do you take?

MR. CUMMINGS: Your Honor, at this point I am going to object. We are going well beyond the direct testimony.

MR. DeBERNARDO: This man has testified that these buildings are under his responsibility, and he walks through this plant two to three times a

day, and he has responsibility for safety.

Now, they have offered him here as an expert.

I am entitled to question his credibility, and I am entitled to go into what are his responsibilities at that plant.

MR. CUMMINGS: A point of clarification. Mr. Weller had not been offered as an expert any more than any other superintendent in his position would be exposed to safety, and be an expert quote and unquote in safety, and he was offered to demonstrate some facts, and I will withdraw my objection, however, to that question, and reserve the right to reinstate it if this gets too far afield.

THE COURT: Proceed.

Q Would you answer the question.

A Repeat the question.

MR. DeBERNARDO: Would you read it.

(Pending Question read by the Reporter)

A If I see a violation, a safety violation, I immediately stop whatever the act was.

MR. CHERTKOV: Could the witness please speak up?

A If I see a safety violation, and in my opinion if it is a safety violation, I stop whatever is happening at that time.

Q Since January 1st, how many times have you stopped a job or an employee because of safety violation at 273 plant?

A This is a real difficult thing. I would say that I stopped people on some kinds of a safety violation a half a dozen times a day.

Q Who do you report to? Who is your supervisor?

A T. E. Schultz, Manager of Manufacturing, and he controls the large machine.

Q Does Mr. Schultz have responsibility for the plant at Nott Street plant?

A Yes.

Q Would it be fair, then, to say that there is one management team for the 1 River Road plant and Nott Street plant?

A If you start at the general managers -- no, I am sorry. You can't even start at the general manager's level, because there are two general managers who have responsibilities at that plant.

Q But you have responsibilities for plants at both sites?

MR. CUMMINGS: At what plant are we talking about?

THE WITNESS: At both locations. 273 and at Nott Street.

Q Was a copper wire used on any of those scaffolds as a mid-rail?

ONLY COPY AVAILABLE

tion, that was used as a mid-rail on the platform, was it slack in any manner?

A The position that it was hooked to the top rail, it was.

MR. CHERTKOV: Would the Reporter please read to the Court the answer to that last question?

THE COURT: Yes.

(Last Question and Answer read by the Reporter)

Q Mr. Weller, you have 800 people under your supervision; is that correct?

A Yes.

Q What job categories are these people?

A They run the gamut from plant utility and sweeper type of people, chippers, welders, machine operators, assembly type of a people, pipers and fitters and general machine shop type activities.

Q Were you present during the course of the inspection?

A Not the whole time.

Q Let me finish my question.

A Yes.

Q Were you present during the course of the inspection when the Compliance Officers observed the portable handheld pneumatic chisel that is alleged not to have a tool retainer on it?

A No.

for various reasons, including security and trades secrets, without special permission.

THE COURT: Will you stipulate that pictures cannot be taken in the plant?

MR. CUMMINGS: We will so stipulate.

THE COURT: Is there provision for the Union to request permission to come in and take pictures of particular subject matters which may or may not be granted?

MR. CUMMINGS: I know of no such request.

THE COURT: Under your ground rules, is this feasible?

MR. CUMMINGS: Your Honor, our position would be, we would have to consider it upon a request, and it has never come up, and we would have to do the necessary legal review of that.

THE COURT: Does that answer your question, Mr. Chertkov?

MR. CHERTKOV: Sure.

Although, you know, I could submit a lot of evidence showing that the Union has made the request to do that, and they refused. We need not get into that.

Q I would like to ask this witness, in your testimony, in response to a question asked by Mr. Cummings, you said that

ONLY COPY AVAILABLE

the employees knew, and not to go up on scaffolding, or platforms where there were inadequate railings, and they were unsafe. Was that not your testimony?

A I don't believe so.

Q Do employees go up on unsafe railings or scaffolds?

A I believe employees have.

Q How do they know whether it is unsafe?

A They will question things if they feel they are unsafe.

Q Do you tell them that it might be unsafe?

A I can't say that we specifically tell them that that is a particular hazardous thing.

Q Do you have literature which you distribute to the employees, when they come to work, or as they arrive at a particular job site, which explains what a safe scaffolding might or might not be?

A We go through a job hazard analysis with new employees coming into the area. Whether the job has it analysis for that particular job includes that, I can't tell you.

Q Do you know whether or not it includes information about chipping hammers?

A No, I could not specifically say that.

Q Now, are you the person that conducts the job hazard analysis?

A No.

practice you could get it to go far out; is that your testimony? Is it possible that a chipping hammer could be lying on the floor and somebody could accidentally kick it in some way, and that would cause it to eject?

A I would say that it is impossible.

Q Absolutely impossible?

A I would say so.

Q For what reason would you say that it was impossible?

A Because you have to have the chisel back against the anvil that drives it in a tight position, and if it is just laying there loose, and you can't put the impact into that chisel.

Q But if the chisel were actually fitting inside the chipping hammer at the time, and then perhaps it could shoot out; is that not correct?

A That is a very loose fit, and when we were trying this, and if that chisel was as much as one-quarter of an inch away from the end, you couldn't make it -- you couldn't even touch the chisel. So it has got to be in back, in the tight position, to create the pressure.

Q Now, you mentioned that there are a half a dozen times a day that you see unsafe conditions in the plant which you try to correct. Most of those situations are violations of safety glass regulations, are they not?

A That would be probably a good portion.

ONLY COPY AVAILABLE

(A discussion off the record)

THE COURT: Have the record reflect that the Counsel for the Government objected to the introduction of the document offered by General Electric, and at this point it was withdrawn.

You may proceed, Mr. Cummings.

MR. CUMMINGS: I would call, at this time, Your Honor, Mr. Bruce Henkel.

B R U C E F R E D E R I C K H E N K E L ,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUMMINGS:

Q Mr. Henkel, by whom are you employed?

A General Electric.

Q In Schenectady?

A Yes.

Q What is your job with GE in Schenectady?

A Well, a laborer.

MR. CHERTKOV: Louder, please.

THE WITNESS: A laborer.

Q Have you ever worked in your job as a laborer with GE with jackhammers?

A Yes.

Q In any previous occupations, have you ever worked with jackhammers?

A In the service.

Q In the service?

A Yes.

Q Where in the service, sir?

A Vietnam.

Q What branch of the service?

A Navy Seabees.

Q Do you recall an OSHA inspection being conducted in late March, in an area in which you were working?

A Yes.

Q What were you using, what piece of equipment, if any, were you using during or at about the time of that OSHA inspection?

A A jackhammer.

Q Was anyone with you when you were using the jackhammer?

A Yes.

Q What is his name or their names?

A Van Blaricom.

Q Spell that.

A I can't.

Q I can't, either. Did the OSHA party stop in your work area?

ONLY COPY AVAILABLE

A Yes.

Q Could you tell us, if you recall, when you were working that day were you wearing safety glasses at all times when you were actually operating the hammer?

A Yes.

Q Was Mr. Van Blarcom?

A Yes.

MR. CUMMINGS: No further questions.

THE COURT: Mr. DeBernardo?

CROSS EXAMINATION

BY MR. GOTSCH:

Q Mr. Henkel, you said that you were wearing safety glasses at the time of the inspection?

A Yes.

Q Were these safety glasses equipped with side shields?

MR. CUMMINGS: Object, Your Honor. I don't believe that that is an issue at all. The Government's point and whole case has been that these gentlemen didn't have safety glasses on.

THE COURT: I will permit him to describe the kind of glasses he was wearing.

A They were regular safety glasses, without the side shield.

Q Without side shields?

A Yes.

Q Mr. Henkel, which department are you in with General Electric?

A SUO.

Q What is SUO?

A Schenectady Utility Operations.

Q The Reporter has to get this. Keep your voice up. SUO, what type of a work do you do as a member of SUO?

A Heavy construction.

Q Where do you usually work?

A Building 273.

Q Do you work elsewhere throughout the plant?

A Occasionally.

Q What are some of the other locations?

A Well, 285 and 51.

Q How long have you been employed by General Electric?

A Seven months.

Q Seven months?

A Yes.

Q During the course of the seven months, have you ever received any instructions on the use of eyeglasses, safety glasses?

MR. CUMMINGS: Your Honor, I don't believe that this point was raised on direct examination, and I don't believe that it is a proper subject for

cross.

THE COURT: Let's limit ourselves a little bit.

MR. GOTSCH: Well, I think it has some relevance, and I think that we, right now, have a conflict over whether he was wearing merely safety glasses or safety glasses with safety shades.

THE COURT: This witness testified that he was wearing glasses without side pieces.

MR. GOTSCH: All right.

Q Mr. Henkel, to your knowledge, do the other men -- how many other men work with you in SUO?

A Laborers?

Q In your immediate work group.

A Well, there is six others besides me, but this is only laborers.

Q What types of occupations do these laborers perform?

A Well, construction, I guess, like that day we were busting out a foundation.

Q All of the men in your group have occasion to use jackhammers?

A Yes.

Q What type of eye protective devices are the men in your group provided?

A Safety glasses.

Q Are these safety glasses with side shields?

A Now they are.

Q Now they are? How about up to and including March 21st and 22nd of 1973?

A No. I wasn't wearing them and nobody else was equipped with them.

Q Nobody else that you know of, in your particular group, was wearing eyeglasses with safety shields?

A Yes.

Q All of these men have occasion to use jackhammers?

A Yes.

Q If you, of your own knowledge, if you were observed operating a jackhammer without safety glasses, what would be, by management representative, or a foreman, what would be the likely result of that?

A If I was observed?

Q If one of the foremen, or the foreman that you worked for directly, saw you operating your jackhammer without wearing proper eye protective devices, what would be the result?

THE COURT: If he knows.

Q If you know.

A I don't know. I have been, you know, around the plant before, and sometimes I may take them off and maybe a couple of feet before I got to the door or something like that, and they, you know, you are told to put them on, and I wouldn't, you know, during the operation, especially with the chips flying.

ONLY COPY AVAILABLE

Q Okay. If you know, has anyone ever been penalized by management for not wearing their safety glasses?

MR. CUMMINGS: Your Honor, I am going to object, and we have gone again so far afield from the direct, that I am just going to have to state an objection to any of these kinds of questions, including this one, in particular this one, Your Honor.

MR. GOTSCH: I don't know if I quite agree, because the citation calls for eye protective devices, and we are trying to get at the background of the, perhaps previous violations regarding the eye protective devices, and it is a fairly broad definition in the citation. Well, this man, from his on-the-job experience, has some knowledge, perhaps only seven months worth of the type of eye protective devices that have been provided, and what enforcement procedures GE has for insuring that they are in use.

THE COURT: Mr. Chertkov?

MR. CHERTKOV: I would agree with the Soliciter.

THE COURT: I am going to permit him to ask the questions, Mr. Cummings.

Q Mr. Henkel, do you know, of your own knowledge, do you know of anyone who has been penalized by management for not wearing eye protective devices?

A No.

MR. CUMMINGS: I am going to object there. First we have to lay the foundation, if anyone is wearing them while operating, and I think the question begs a question is my point.

THE COURT: Rephrase the question so that he could answer it yes or no.

MR. GOTSCH: All right.

Q Mr. Henkel, do you know of any employees who might have not been wearing proper eye protective devices when they were engaged in an activity where the, such devices were required? Yes or no?

A No.

Q You don't know of anyone?

A No.

Q Has your foreman ever instructed you on the use of eye protective devices?

A No. It was, you know, explained in the very beginning, I would imagine, just taken for granted you wear them day in and day out.

Q When you say the word "beginning", when you first hired --

A The first day, I was issued them the first day.

Q Did they bring them up the first day that you were there?

A I was instructed to wear them. That is --

Q They instructed you to wear safety glasses at that time; is that correct?

A Yes.

Q With nothing further said than that?

A No.

Q That is until after the March inspection, and when then you were provided with safety glasses with side shields?

MR. CUMMINGS: We will stipulate that after this inspection we provided side shields, because we are not using this trial, or this hearing, as a shield, and we are trying to comply in any instances with the orders of the OSHA inspector pending this hearing. If Counsel introduces this type of a thing as an admission, and that is his point, and I think that we would have to think twice about doing that, and so would all other employers, in any further hearing.

THE COURT: I think that the testimony is clear that this plant is full of signs telling people to wear glasses, and he testified that he was told the first day to wear glasses, and he wore the glasses that were furnished, and on a particular date they furnished him with a different pair.

MR. GOTSCH: That is correct, I agree. I don't think

that we have any further questions of this witness.

THE COURT: Mr. Chertkov?

CROSS EXAMINATION

BY MR. CHERTKOV:

Q Is it possible, Mr. Henkel, that as the inspection party approached you, that you may have taken off the glasses that you had on, after you had stopped using the jackhammer?

A Usually, after I stop using the jackhammer, you know, like I say, they have to use the broom to keep the dust down, and you can't keep it all down, and some gets on the eyeglasses and usually, after I get done, take them off to clean them.

Q So it is possible, is it not, that you may have taken them off after the inspectors got over near, right near where you were standing? Is that not true?

A Well, sure, yes. Cleaning purposes.

MR. CHERTKOV: I have no further questions.

THE COURT: Mr. Henkel, just one or two questions.

BY THE COURT:

Q Do you normally wear glasses?

A No, sir.

Q When you are in the plant and wearing protective glasses, do you remove them when talking to other people?

A No, sir.

ONLY COPY AVAILABLE

Q Do you engage in conversations with people while wearing your protective glasses?

A Yes.

Q Are you a member of the Union?

A Yes.

Q What Union do you belong to?

A 301.

THE COURT: I have no further questions.

MR. CUMMINGS: None, Your Honor.

MR. CHERTKOV: Before this witness is dismissed, could we approach the bench?

Could we go off the record?

THE COURT: I am going to put it in the record after, anyway.

MR. CHERTKOV: The issue has developed in this case, is the extent to which, if at all, the witnesses that are employees of General Electric are paid during the time that they are appearing in this proceeding.

THE COURT: That has nothing to do with this hearing.

MR. CHERTKOV: I think that if employees are going to have a full opportunity to participate in the processes of the Occupational Safety —

THE COURT: I just have no jurisdiction in that area. I have no jurisdiction over General Electric's

company which manufactures Weldevators. I had not intended to use him. As I understood the issue, it was the four by one rule. We changed the issue because of the Secretary's change --

THE COURT: Are you conceding the issue has been changed --

MR. CUMMINGS: No, sir. I am not. My point is, that I haven't changed that, but we have at least left the door open for a change in the position, and this witness would speak to that point.

MR. DeBERNARDO: In view of the fact that the Secretary amended or made the attempt to amend to 5A1, that I don't think that we could validly raise an objection to this witness.

MR. CHERTKOV: I would like the record to show that the Union has no objection, Your Honor.

THE COURT: Have the record so indicate.

GORDON RICHARDSON, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUMMINGS:

Q Mr. Richardson, would you state your full name for the record, please.

A Gordon M. Richardson.

ONLY COPY AVAILABLE

Q What is your present occupation, sir?

A I am Vice President of Engineering and Manufacturing with the M. D. Knowlton Company.

Q Does the M. D. Knowlton Company make what is commonly referred to as a Weldevator?

A Yes, sir.

MR. CUMMINGS: I would like this marked as R-8, I believe.

(Exhibit R-8 marked for identification)

Q I show you what has been marked as Respondent's 8, Mr. Richardson.

A Yes.

Q Could you identify the object which is in the middle of that picture?

A This is a vertical lift that we manufacture.

Q By "this", the witness is referring to —

A Normally called Weldevator.

THE COURT: What?

THE WITNESS: This structural.

MR. CUMMINGS: Perhaps we could circle that and label it.

THE WITNESS: This one, also.

THE COURT: Just draw a circle around it.

Q Circle that and label that A.

THE COURT: We are only going to talk about the big one.

ONLY COPY AVAILABLE

circled A.

MR. CUMMINGS: I would move the introduction of this photograph.

THE COURT: Any objection?

MR. DeBERNARDO: Without some identification, and when this picture was taken, where it was taken, and is this the Weldevator that is the subject of this citation?

MR. CUMMINGS: May I speak to that, Your Honor?

THE COURT: Yes.

MR. CUMMINGS: This is the typical large Weldevator, which the picture was taken at the end of May, or the beginning of June, and it is typical of the Weldevators cited in your citation. Any difference you see, and you could point out, and I am not aware of any great difference. I don't introduce it, nor do I argue that it is the exact Weldevator. I do argue that it is representative of that machine.

THE COURT: Is it offered as a representative photograph of the typical Weldevator in use currently?

MR. CUMMINGS: Yes, Your Honor.

THE COURT: Is there any objection to the picture as offered?

MR. CHERTKOV: Did this witness take this picture?

ONLY COPY AVAILABLE

THE WITNESS: No, sir.

MR. DeBERNARDO: We have no objection to it, if it is being offered to, being offered as a representation of a Waldevator generally.

THE COURT: As used in the plant.

MR. DeBERNARDO: Yes.

MR. CHERTKOV: That is fine.

THE COURT: It would be so received.

(Exhibit R-8 received into evidence)

Q Mr. Richardson, to your knowledge how long has the various, have the various departments and facilities in GE, Schenectady, utilized this type of a Waldevator?

A About seven years. Seven, between seven and eight years.

Q Have you ridden any of these units yourself in the General Electric plant?

A Yes.

Q How high up have you gone in these units?

A To the top. The highest ones are 31 feet, I believe, and I have ridden to the top.

Q There are some that are somewhat shorter than that?

A Yes.

Q How much sway is there at about 26, 30 feet level, in your opinion, sir?

A Oh, somewhere between a half, a half an inch to one

ONLY COPY AVAILABLE

making. When we started this hearing I told all of you that I believe that such a hearing shall be conducted with great liberality, and that the parties shall be afforded every opportunity to get all the evidence into the record, so that I could make an informed, correct decision.

When the Government presented its witnesses, I afforded you, Mr. Cummings, that opportunity on cross examination. I am not depriving the Government of the same opportunity now.

You may proceed.

Q Yes. Mr. Richardson, is this Weldevator, as shown in the R-9, a portable device?

A Well, I think that you will have to define "portable", really.

Q Well, would it be possible to move it, using manpower?

A No.

Q Is it possible to move it by crane?

A It can be picked up with an overhead crane of suitable capacity.

Q Do you know of any other way that it could be moved from place to place?

A Well, there is many other ways of rigging a piece of heavy equipment, you know, and it is almost infinite, depending upon your emergency.

ONLY COPY AVAILABLE

Q What is the weight of one of these Weldevators, as shown in the picture?

A In the area of 3500 pounds.

Q 3500 pounds?

A Yes.

Q Have any moment of overturn tests been conducted on Weldevator?

A Not on that particular model, no, sir.

Q Not on that particular model?

A No, sir. You mean by tests, and you — you mean actual overturning tests, under load conditions?

Q That is correct.

A No, sir.

Q Mr. Richardson, do they ever provide wheels on these Weldevators, and are they ever built with casters?

A Some of the lower height models have wheels on, for— they are what we would normally call portable units, yes.

Q Does this R-8, is a 32 foot extension?

A Yes.

Q Those are —

A 31 feet, I believe.

Q Those are not provided with casters or wheels?

A No, sir.

Q Mr. Richardson, with respect to portable scaffolds, the standards utilize a 421 test. The minimum base should be

ONLY COPY AVAILABLE

I think the point is too important to stipulate to.

THE COURT: All right. All you have got to say is "no".

MR. DeBERNARDO: No.

THE COURT: We waste a lot of time making up our minds.

MR. CUMMINGS: I would call Robert Bloomer.

ROBERT A. BLOOMER, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CUMMINGS:

Q Mr. Bloomer, what is your present job?

A Present position is Manager of Community Liaison, and that is community relations, for those who can't pronounce the "liaison", public affairs for the Schenectady General Electric.

Q How many years have you been employed by GE?

A Thirty-six years.

Q How many years have you been associated with the Schenectady facility of the General Electric Company?

A For about thirteen years prior to going to another department, and back last September to the Schenectady plant of the General Electric.

Q How many departments are there in Schenectady, Mr.

Bloomer, of the General Electric Company?

A Schenectady area there are approximately 64, right at the moment.

Q How many divisions are located in the Schenectady area?

A 16, as a matter of fact.

Q What are some of the products that these departments manufacture, Mr. Bloomer?

A Well, let's start with steam turbines and generators and gas turbines and microwave tubes, special castings, special enamels for insulating wires, and wire itself, small AC motors, large AC motors, probably others I can't remember.

Q Are motors made by a separate department?

A Yes, sir.

Q Is there a division called Motor Division, sir?

A There is a large AC motor division that is broken down into departments, depending on the size of the motors.

Q Gas turbines, Mr. Bloomer, is there a Gas Turbine Division?

A There is a Gas Turbine Division.

Q Are there gas turbine departments? How is that broken down?

A Small gas turbines and large gas turbines. Two distinct departments.

Q As to the steam turbine and generator, is there a

Steam Turbine-Generator Division?

A There is a division, yes.

Q What are the departments that make up that division?

A There is the Turbine Department and then the Generator Department.

Q How about SUO? Is that a part of that division?

A Yes. There are other divisions.

Q Other--

A Other departments within the large Steam Turbine-Generator Department Division.

THE COURT: Please explain SUO.

THE WITNESS: Schenectady Utility Operations, the landlord of the plant, if you will, responsible for the total operation of the plant facilities.

Q Are there any laboratories associated with the Schenectady facilities?

A Yes, sir.

Q How many and generally what do they do?

A Well, there are the large laboratories, are the corporate research and development laboratory of the Knowls Atomic Power Laboratory, and Materials and Process Laboratory, Engineer Cast Products Development Laboratory.

Q How many hourly employees are there at the Schenectady facilities, Mr. Bloomer, approximately?

A About 13,000, I would say, at the most.

Q How many total employees?

A Schenectady area is about 27,500.

Q How many of the hourly employees, approximately, are represented by IUE?

A Approximately 11,000.

Q Does the Steam Turbine Division have a general manager?

A Yes, sir.

Q Is he also a Vice President?

A He is that.

Q The [illegible]urbine Division, does it have a general manager?

A It does.

Q Is he also a Vice President?

A He is.

Q Does the Motor Division have a General Manager?

A Yes, it does.

Q Is he also a Vice President?

A Also a Vice President.

Q Do most divisions or all divisions headquartered here, or in some way present here, have general managers?

A Yes, sir.

Q Are many of those general managers Vice Presidents?

A Yes, sir.

MR. CUMMINGS: I have no further questions.

THE COURT: Mr. DeBernardo?

CROSS EXAMINATION

BY MR. DeBERNARDO:

Q Now, how many plants, or I should say, how many locations does GE have in Schenectady?

A Locations in Schenectady? You mean Schenectady County?

Q The metropolitan Schenectady area.

A The GE main plant here, as you well know; the Knowls Atomic Power Laboratory, and the Research and Development Laboratory in Niskayuna and part of the Knowls in Saratoga County, in West Milton, the Castle Ring site, I guess.

Q Is there a plant at Nott Road?

A Nott Street, yes, sir. That is an extension of the main plant. We consider it as the main plant.

Q What do you mean by the term you consider it as part of the main plant?

A It is such an integral part of the operation, just because it is physically located on the other end of the boulevard, doesn't distinguish it as a separate organization, sir.

Q What is the connection in terms of production between the Nott Street plant and the Schenectady -- I should say the 1 River Road plant?

A They have a manufacturing facility to manufacture certain components of both generators and turbines.

Q Is a part of the Turbine Department at the Nott Street plant?

A Yes, sir.

Q In SUO, what was the -- I didn't catch the definition. What was the --

A Schenectady Utility Operations. They provide the landlord services of the plant, as we have it, ground maintenance, operation of the power generation facilities, and general housekeeping responsibilities, fire protection, security protection.

Q Does SUO provide, as you call it, the landlord services at the 1 River Road site?

A Yes, sir.

Q Does it provide the landlord services at the Nott Street site?

A Yes, sir.

Q Now, you stated that there are 64 departments; is that correct?

A Yes.

Q Are these departments legal entities of the General Electric Corporation, or partnership, or are they just divisions of the company?

A They are division and department of the General Electric

are located in Schenectady, and have people represented in Schenectady?

A I think that there are about 12.

MR. CUMMINGS: No further questions.

THE COURT: Mr. DeBernardo, are there any questions that you have to ask relating to the matters brought out by Mr. Chertkov and Mr. Cummings, in the last questions?

RECROSS EXAMINATION

BY MR. DeBERNARDO:

Q Briefly, would you tell us how big is the 1 River Road site? In terms of how many acres, if you know?

A You shouldn't ask me. I know, and I can't say. Let's see. 130 acres, and I really can't remember.

Q Could you say that it is between 100 and 200 acres?

A Oh, yes.

Q Approximately how many buildings at the 1 River Road site?

A Only been down here since September, and I haven't counted them all yet. That is a career. I just don't know the number. It is sizable.

Q Say over 50?

A Yes, sir.

Q In your own words, could you tell us the size of the

Exhibits to Transcript

(See Opposite) ☞

259a

Complainant's Exhibit 1

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

C-1

203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	OFFICE NO.
2-0139	07
AREA	REGION
Syracuse	II

OSHA-2 CITATION*

Citation Number 2 Date Issued DEC 2 1971

EMPLOYER General Electric Co., Inc.

ADDRESS (Street 1 River Road

(City Schenectady State New York Zip 12345

An inspection of a workplace under your ownership, operation, or control located at

and described as follows Building #61

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	REPEAT Public Law 91-596 Occupational Safety and Health Standards-Subpart L Sec. 1910.157(a)(5)	Four fire extinguishers in gas turbine laboratory were not located on brackets, hangers or standing on shelves.	Has been corrected
2.	Subpart E Sec. 1910.36(b)(3)	Building is without exits of kinds, numbers and location, appropriate to the structure and character of occupancy.	Has been corrected

Area Director's Signature
Harry J. Eiermann, P.E.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

ONLY COPY AVAILABLE

260a

Complainant's Exhibit 1

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

200 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

Case No.	OSHA No.
[illegible]	[illegible]
Area	**Region**
Syracuse	II

OSHA-2 **CITATION***

Citation Number [illegible] Date Issued [illegible]

EMPLOYER [illegible]

(Street [illegible]

ADDRESS (

(City [illegible] State [illegible] Zip [illegible]

An inspection of a workplace under your ownership, operation, or control located at [illegible]

[illegible] and described as follows

[illegible]

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	Public Law 91-596 Occupational Safety and Health Standards-Subpart D Sec. 1910.22(a)(1)	Electrical leads to hold positioner device, Bay A-3, are a tripping hazard in work area.	Has been corrected
2.	Same	Slippery floor area in Aisle, Bay C-1	Has been corrected
3.	Same	Floor adjacent to accessory area, Bay C-14, is slippery.	Has been corrected
4.	Same	Work platform, Bay A-32, obstructed by stored materials.	Has been corrected
5.	Same	Floor surface blocks loose and missing, Bay F-35.	Has been corrected
6.	Same	Material stored in runway, approximately above floor level, at lathe saw machine, Bay C-20.	Has been corrected

REPEAT

Area Director's Signature [illegible]
Harry J. Eiermann, P.E.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

GPO 911.[illegible]

ONLY COPY AVAILABLE

Complainant's Exhibit 1

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

202 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CASE NO.	SUBAREA NO.
[illegible]	57
AREA	REGION
Syracuse	II

OSHA-2 **CITATION***

Citation Number 4 Date Issued DEC 2 1971

EMPLOYER [illegible]

(Street [illegible]

ADDRESS (

(City [illegible] State [illegible] Zip [illegible]

An inspection of a workplace under your ownership, operation, or control located at [illegible]

[illegible] and described as follows

[illegible] 1971

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	Public Law 91-596 Occupational Safety and Health Standards-Subpart D Welding, Cutting and Allied Processes Sec. 1910.252(a)(2)(i)	Floor in work area, Bay K-3, has [illegible] leads from [illegible]	Has been corrected.
2.	REPEAT	[illegible] adjacent to certain drill, Bay K-12, has a hazardous accumulation of metal chips on floor.	Has been corrected.
3.	Subpart N- Sec. 1910.176(b)	"Spot head", approximately 40" diameter, standing on floor, approximately 12" diameter, Bay A-6.	Has been corrected.
4.	Same	Storage shelves appear to be overloaded and in danger of collapse.	Has been corrected.

Area Director's Signature [illegible]
Harry J. Ziemann, P.E.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

ONLY COPY AVAILABLE

262a

Complainant's Exhibit 1

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

200 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CASE NO.	COMPL. NO.
2-0139	07
AREA	REGION
Syracuse	II

OSHA-2 **CITATION***

Citation Number 5 Date Issued DEC 2 19..

EMPLOYER Carmel Blouse Co., Inc.

(Street 1 River Road

ADDRESS (

(City Schenectady State New York Zip 12305

An inspection of a workplace under your ownership, operation, or control located at

and described as follows

Building 1273

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	Public Law 91-596 Occupational Safety and Health Standards-Subpart H Sec. 1910.176(a)	Stacked [illegible], Bay A-10, presents a tripping hazard.	Has been corrected.
2.	Same	Material stored on stairway to upper level of structure, Bay C-35.	Has been corrected.
3.	Same	~~Aisle in C-33, Lyon [illegible] obstructed by materials.~~	Has been corrected.
4.	Subpart I Sec. 1910.133(a)(1) REPEAT	Employee, Bay C-15, operating air chipping hammer, was without suitable eye protection.	12/23/71
5.	Same	~~Building Bay D-5, operator was~~ not using welding device was without suitable eye protection.	12/23/71

Area Director's Signature

Harry J. Ziermann, P.E.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

ONLY COPY AVAILABLE

263a

Complainant's Exhibit 1

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

200 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CB-5 NO.	OSHA NO.
[illegible]	[illegible]
AREA	AREA OFFICE
Syracuse	II

OSHA-2 **CITATION***

Citation Number 6 Date Issued [illegible]

EMPLOYER [illegible]

(Street [illegible]

ADDRESS (

(City [illegible] State [illegible] Zip [illegible]

An inspection of a workplace under your ownership, operation, or control located at [illegible]

[illegible] and described as follows

[illegible]

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	Public Law 91-596 Occupational Safety and Health Standards Subpart N Sec. 1910.176(b)(4)	[illegible]	[illegible]
2.	Subpart D Sec. 1926.451(c)(1)	Work platforms, bay D-6, 5' above surrounding surface, not planked or otherwise covered. REPEAT	11/20/72
3.	Same	Work platform, approximately 25' above surrounding surface, on tiers for lacing, bay D-6, is not fully planked or decked.	11/20/72
4.	Subpart D Sec. 1910.23(a)(3)	Tubular scaffold approximately 25' high in stator assembly area, bay C-16, was without handrails on open sides and back.	11/20/72

Area Director's Signature [illegible]
Harry J. Eiermann, P.E.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the date this citation was issued.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

GPO 911.451

ONLY COPY AVAILABLE

Complainant's Exhibit 2

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

ONLY COPY AVAILABLE

203 Midtown Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	OSHA-1 NO.
AREA	REGION

CITATION*

Citation Number _____ Date Issued _____

EMPLOYER _____

(Street _____

ADDRESS (

(City _____ State _____ Zip _____

An inspection of a workplace under your ownership, operation, or control located at _____

_____ and described as follows

_____

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1	29 CFR 1910.212(a)(3)	[illegible] guard on gang machine, used for planing, has an opening of 3½ inches.	Has been corrected.
2	29 CFR 1910.147(c)(2) REPEAT	[illegible] electrically, at least until adjacent to the machine, was standing on the floor.	Has been corrected.
3	29 CFR 1910.212 (a)(2)	Guard and enclosure around [illegible] drive belts and pulleys, 19 plane machine to plane machine and 15 plane machine.	Has been corrected.
4	29 CFR 1910.22 (a) (2)	Accumulation of varnish and debris, between 18 and 7 plane machine, is a slipping and tripping hazard.	Has been corrected.
5	29 CFR 1910.316 (d)	Electrical lead to pot motor, 21 plane machine, is spliced.	Has been corrected.

Area Director's Signature _____

[illegible]

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

Form OSHA-2

265a
Complainant's Exhibit 3

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

203 Midtown Plaza
700 E. [illegible]
Syracuse, N. Y. 13210

CASE NO.	SHORT NO.
D-5333	12
AREA	REGION
6010	2

CITATION*

Citation Number 1 page 1 of 1 Date issued October 2, 1972

EMPLOYER General Electric Company

ADDRESS (Street Building 320 Nott Street

(City Schenectady State New York Zip 12345

An inspection of a workplace under your ownership, operation, or control located at above address

and described as follows

pipe fabrication shop

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1	29 CFR 1910.252 (e) (2) (j) (iii) Page 10666 REPEAT →	Failure to protect workers or other persons adjacent to the welding areas from the rays of the welding arc by noncombustible or flameproof screens or by appropriate goggles.	30 days from the receipt of this citation.

Follow-up NOV 4

Area Director's Signature Chester C. Whiteside

Chester C. Whiteside, Acting

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

OSHA 55-252

Form OSHA-2
[illegible] 1971

Complainant's Exhibit 4

U.S. Department of Labor
Occupational Safety and Health Administration

203 Mitchell Plaza
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	COMPANY NO.
N-2767	40
AREA	REGION
6010	2

CITATION*

Citation Number 1, Page 1 of 2 Date Issued March 12, 1973

EMPLOYER General Electric Company

ADDRESS (Street One River Road

(City Schenectady State New York Zip 12345

An inspection of a workplace under your ownership, operation, or control located at Building #61 at above address and described as follows

One Building of Brick and Steel Construction, with 15,000 Square Ft.

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1.	29 CFR Section 1910.23 (c)(1) Page 22109	In Building #61, number 1 and 2 weld position platforms, and the 2 outboard supports, were not equipped with a standard guard rail on all sides, as required. The number 2 positioner weld position 1 and 2 were not equipped with a toe board to prevent falling material from creating a hazard.	April 13, 1973

CFTEA 7

Area Director's Signature [signature] Chester C. Whiteside, Acting

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

Form OSHA-2

Complainant's Exhibit 4

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

[illegible]
700 E. Water St.
Syracuse, N. Y. 13210

CSHO NO.	OSHA-1 NO.
N-2767	40
AREA	REGION
8010	2

CITATION*

Citation Number 1, Page 2 of 2 Date Issued March 12, 1973

EMPLOYER General Electric Company

ADDRESS (Street One River Road

(City Schenectady State New York Zip 12345

An inspection of a workplace under your ownership, operation, or control located at Building #61, at above address and described as follows

One Building of Brick and Steel Construction, with 15,000 Square Ft.

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
2.	29 CFR Section 1910.157 (a)(3) Page 22243 REPEAT	A hand held fire extinguisher located in Building #61, was obstructed and obscured from view.	Immediately Upon Receipt of This Citation

Area Director's Signature [signature]
Chester C. Whiteside, Acting

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occured." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

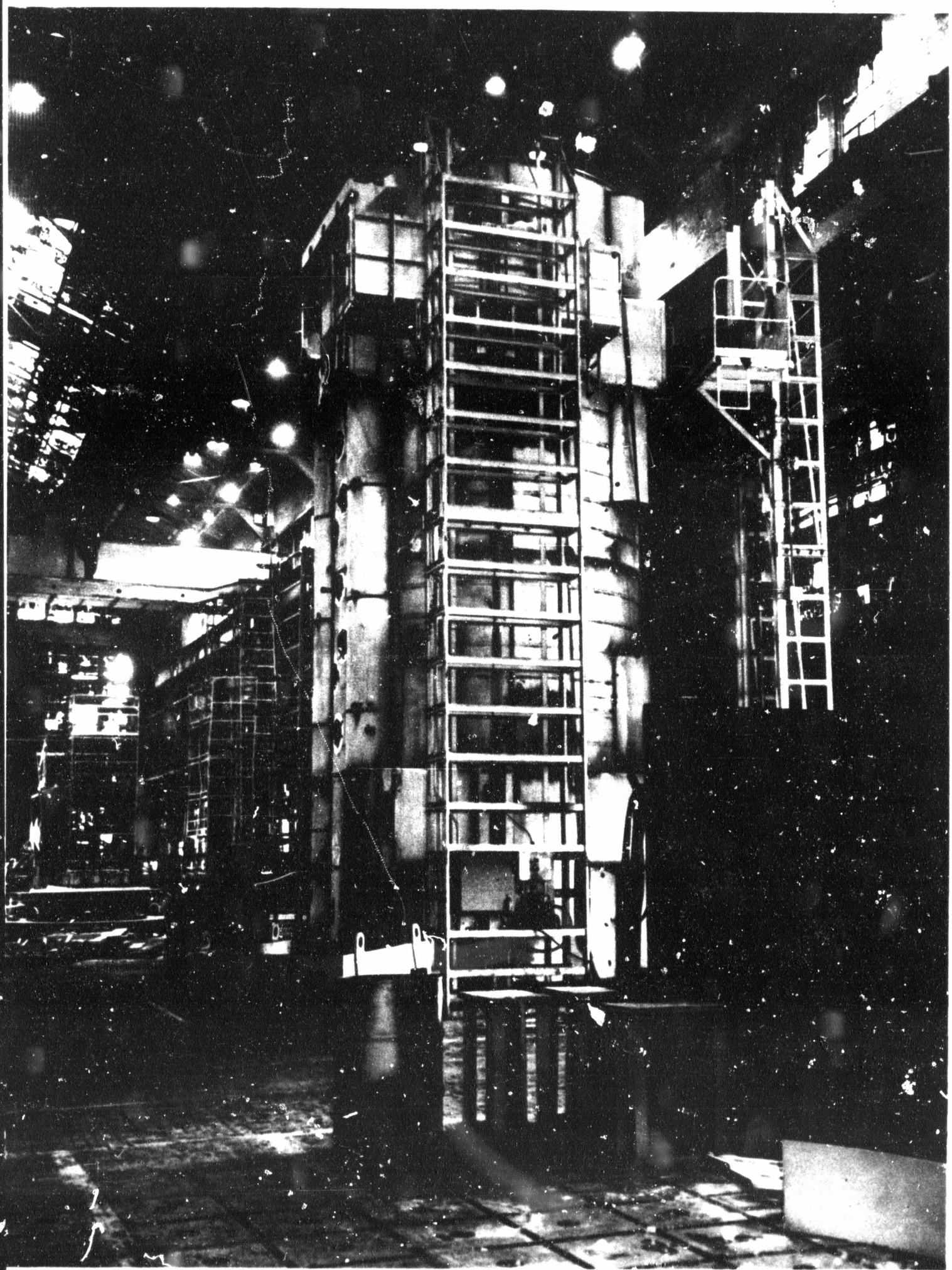
* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

Form CSHA-2

268a

Respondent's Exhibit 8

(See Opposite) ☞



Respondent's Exhibit 8

Administrative Law Judge's Decision and Order, dated November 19, 1973

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, U.S. Department of Labor	:	
Complainant	:	Decision and Order
v.	:	OSHRC DOCKET NO. 2739
GENERAL ELECTRIC COMPANY, INC.	:	
Respondent	:	

OSHRC EXECUTIVE SECRETARY
JUDGE'S DECISION REC'D NOV 19 1973
FINAL ORDER ON DEC 19 1973

LOCAL NO. 301, INTERNATIONAL UNION of ELECTRICAL WORKERS	:	
Authorized Employee Representative	:	

Appearances:

Louis DeBernardo, Esq. and
Theodore J. Gotsch, Esq. for
the Secretary of Labor

E. J. Cummings, Jr., Esq. and
Hardy Maclay, Esq. for
the Respondent

Boren Chertkov, Esq. for
the Authorized Employee
Representative

Charles K. Chaplin, Judge, OSHRC

This is a proceeding pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq., hereinafter the Act), wherein Respondent contests each item listed in 5 Citations. All 5 Citations were dated April 13, 1973, and were issued by the Complainant under the authority of Section 9(a) of the Act. The alleged violations and applicable standards are as follows:

Citation for Serious Violation

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
1	29 CFR 1910.252(e)(1)(i) Page 22308	Failure to protect against falling, two welders working on top of a stator frame 15 feet 3 inches above the surrounding surface in Bay A-2, by railings, safety belts, life lines or other equally effective safeguards.	Immediately upon receipt of this citation
2	29 CFR 1910.29(a)(3)(i) Page 22128	In Bldg. #52, Bay A-8, a manually propelled mobile scaffold exceeded the maximum work level height, in that the scaffold was 26 feet 10 inches in height and the base was only five feet two inches in its least base dimension, also, no provision was made to guy or brace the unit against tipping.	Immediately upon receipt of this citation.
3	29 CFR 1910.27(d)(2) Page 22121	In Bldg. #52, a fixed metal ladder 24 feet 4 inches in height, did not have the upper portion of the ladder offset from the platform and lower portion of the ladder.	April 26, 1973

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
		In Bldg. #52, Bay A-32, two fixed metal ladders 24 feet 4 inches and 35 feet six inches in height, did not have either a cage, landing platform well or ladder safety device. In Bldg. #273, Bay K-1, a fixed metal ladder 25 feet 11 inches in height, did not have either a cage landing platform well or ladder safety device.	
4	29 CFR 1910.243(c)(1)(i) Page 22295	Failure to provide a safety guard for a portable abrasive wheel observed in use by employees grinding a turbine shell in Bay A-25. The diameter of the wheel was measured as being five inches.	Immediately upon receipt of this citation.
5	29 CFR 1910.179(f)(4) (vii) Page 22260	In Bldg. #52, Bay C, Furnace Room, the overhead crane was not equipped with a trolley brake to prevent overtravel of the load.	May 16, 1973
6	29 CFR 1910.243(b)(1) (ii) Page 22295	In Bldg. #52, Bay A-9, the employer failed to provide a tool retainer on a portable hand-held pneumatic chisel that was able to eject the tool.	Immediately upon receipt of this citation.
		Citation [Other than Serious Violations]	
1	29 CFR 1910.252(b)(4) (ix)(c) Page 22306	In Bldg. #52, Bay A-12, on an arc welding machine, lengths of electrode (ground) cables had exposed bare conductors.	Immediately upon receipt of this citation.

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
2	29 CFR 1910.27(c)(4) Page 22119	In Bldg. #52, Bay A-32, a fixed metal ladder which was measured at 24 feet 4 inches in height, only had a two inch rung clearance at the 17 foot level.	May 1, 1973
3	29 CFR 1910.27(f) Page 22121	In Bldg. #52, Bay B-24, the side rails of a fixed metal ladder were bent to the left near the bottom, so as to affect the safety and stability of said ladder.	May 1, 1973
4	29 CFR 1910.106(d)(2)(i) Page 22177	In Bldg. #52, Bay A-18, an open 55 gallon drum was observed to be partially filled with combustible paint thinner.	Immediately upon receipt of this citation.
5	29 CFR 1910.176(a) Page 22253	In Bldg. #52, Bay C, furnace room, permanent aisles and passageways were not appropriately marked and kept clear.	May 1, 1973
6	29 CFR 1910.27(b)(1)(iii) Page 22119	In Bldg. #273, Bay H-17, the horizontal drill presses, catalog #16181 and #16182 had fixed metal ladders with rungs that measured 12 inches (the minimum clear length of these rungs shall be 16 inches).	May 1, 1973
	Serious Repeated Violation		
	29 CFR 1910.133(a)(1) Page 22231	Failure to provide suitable eye protection for two employees, Bay K-13, using a jack hammer to break up concrete.	Immediately upon receipt of this citation.

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
		Repeated [Other than Serious] Violations	
1	29 CFR 1910.22(a)(1) Page 22108	Welding leads and compressed air hoses, in use Bay A-7, were scattered about the floor in the work area of the employees so as to be a tripping hazard.	Immediately upon receipt of this citation.
2	29 CFR 1910.157(a)(2) Page 22243	Hand held CO_2 fire extinguisher, Bay A-19, was not readily accessible for immediate availability because of its being obstructed and obscured by compressed air hoses.	Immediately upon receipt of this citation.
3	29 CFR 1910.252(e)(2)(iii) Page 22309	In Bldg. #52, Bay B-12, B-11 and A-9, welding screens, shields or goggles were not utilized or provided to protect the workers and other persons adjacent to these areas from the harmful rays of electric arc welding, while the welding operation was in progress.	Immediately upon receipt of this citation

Willful Serious Violation

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
	29 CFR 1910.23(c)(1) Page 22109	Failure to provide protection against falling to an employee working on a 14 foot high horizontal stator frame, Bay H-17, by means of a standard railing or equivalent.	Immediately upon receipt of this citation.

Willful Serious Violation

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
	Two work platforms six feet ten inches above the surrounding surface, Bay K-8, were not guarded on all sides by a standard railing. Failure to provide a standard railing for a powered work platform #15836, Bay K-11, that can be elevated to a height of ten feet.	

The penalties proposed for the above Citations were as follows:

Citation for Serious Violations

Item	Penalty
1	$1,000.00
2	$1,000.00
3	$1,000.00
4	$1,000.00
5	$1,000.00
6	$1,000.00

Citation [Other than Serious Violations]

1	$0
2	$100.00
3	$0
4	$100.00
5	$0
6	$0

Serious Repeated Violation

$2,000.00

Repeated [Other than Serious] Violations

1	$500.00
2	$100.00
3	$1000.00

Willful Serious Violation

$5,000.00

The standards applicable to each of the foregoing are as follows:

29 CFR 1910.252(e)(1)(i) A welder or helper working on platforms, scaffolds, or runways shall be protected against falling. This may be accomplished by the use of railings, safety belts, life lines, or some other equally effective safeguards.

29 CFR 1910.29(a)(3)(i) The maximum work level height shall not exceed four (4) times the minimum or least base dimension of any mobile ladder stand or scaffold. Where the basic mobile unit does not meet this requirement, suitable outrigger frames shall be employed to achieve this least base dimension, or provisions shall be made to guy or brace the unit against tipping.

29 CFR 1910.27(d)(2) Landing platforms. When ladders are used to ascent to heights exceeding 20' (except on chimneys), landing platforms shall be provided for each 30' of height or fraction thereof, except that, where no cage, well, or ladder safety device is provided, landing platforms shall be provided for each 20' of height or fraction thereof. Each ladder section shall be offset from adjacent sections. Where

installation conditions (even for a short, unbroken length) require that adjacent sections be offset, landing platforms shall be provided at each offset.

29 CFR 1910.243(c)(1) General requirements. (i) All abrasive wheels shall be used only on machines provided with safety guards as defined in the following subparagraphs of the paragraph.

EXCEPTIONS: This requirement shall not apply to the following classes of wheels and conditions [There was no argument that any exception applied].

29 CFR 1910.179(f)(4)(vii) Brakes for stopping the motion of the trolley or bridge shall be of sufficient size to stop the trolley or bridge within a distance in feet equal to 10 percent of full load speed in feet per minute when traveling at full speed with full load.

29 CFR 1910.243(b) Pneumatic powered tools and hose--(1) Portable tools. (ii) A tool retainer shall be installed on each piece of utilization equipment which, without such a retainer, may eject the tool.

29 CFR 1910.252(b)(4)(ix)(c) Work and electrode lead cables should be frequently inspected for wear and damage. Cables with damaged insulation or exposed bare conductors shall be replaced. Joining lengths of work and electrode cables shall be done by the use of connecting means specifically intended for the purpose. The connecting means shall have insulation adequate for the service conditions.

29 CFR 1910.27(c)(4) Clearance in back of ladder. The distance from the centerline of rungs, cleats, or steps to the nearest permanent object in back of the ladder shall be not less than 7 inches, except that when unavoidable obstructions are encountered, minimum clearance as shown in figure D-3 shall be provided.

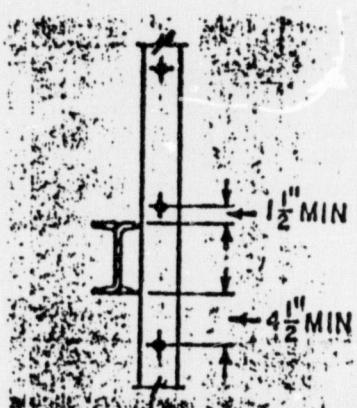


FIG. D-3
Clearance for Unavoidable Obstruction at Rear of Fixed Ladder

29 CFR 1910.27(f) Maintenance. All ladders shall be maintained in a safe condition. All ladders shall be inspected regularly, with the intervals between inspections being determined by use and exposure.

29 CFR 1910.106(d) Container and portable tank storage--(1) Scope--(i) General. This paragraph shall apply only to the storage of flammable or combustible liquids in drums. (2) Design, construction, and capacity of containers--(i) General. Only approved containers

and portable tanks shall be used. Metal containers and portable tanks meeting the requirements of and containing products authorized by Chapter I, Title 49 of the Code of Federal Regulations...shall be acceptable.

29 CFR 1910.176(a) Use of mechanical equipment. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

29 CFR 1910.27(b)(1)(iii) The minimum clear length of rungs or cleats shall be 16 inches.

29 CFR 1910.133(a)(1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

29 CFR 1910.22(a)(1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

29 CFR 1910.157(a)(2) Location. Extinguishers shall be conspicuously located where they will be readily accessible and immediately available in the event of fire. They shall be located along normal paths of travel.

29 CFR 1910.252(e)(2)(iii) Protection from arc welding rays. Where the work permits, the welder should be enclosed in an individual booth painted with a finish of low reflectivity such as zinc oxide... and lamp black, or shall be enclosed with noncombustible screens similarly painted. Booths and screens shall permit circulation of air at floor level. Workers or other persons adjacent to the welding areas shall be protected from the rays by noncombustible screens similarly painted. Booths and screens shall permit circulation of air at floor level. Workers or other persons adjacent to the welding areas shall be protected from the rays by noncombustible or flameproof screens or shields or shall be required to wear appropriate goggles.

29 CFR 1910.23(c) Protection of open-sided floors, platforms, and runways. (1) Every opensided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides:

(i) Persons can pass,

(ii) There is moving machinery, or

(iii) There is equipment with which falling materials could create a hazard.

Local No. 301, International Union of Electrical Workers (hereafter the Union) requested an expedited proceeding which was granted under 29 CFR 2200.101.

Following a prehearing conference the Secretary moved to dismiss the charge respecting the alleged violation of 29 CFR 1910.29(a)(3)(i) and 29 CFR 1910.179(f)(4)(vii). The Union objected to the move to dismiss respecting 1910.29(a)(3)(i) and as a party to the action they were offered the opportunity of going ahead with the proof as to that item, over the Secretary's objection (Tr. 1-245). Final disposition of these motions was reserved urtil the submission of briefs on this point. Midway during the course of the trial the Secretary moved to withdraw its Motion to Dismiss respecting the alleged violation of 29 CFR 1910.29(a)(3)(i) and to amend the Citation to charge a violation of 5(a)(1) of the Act rather than a specific standard. A ruling on this motion was also reserved.

The Secretary also moved to amend the Citation respecting the standard at 29 CFR 1910.106(d)(2)(i), Item 4 of the Citation for other than serious violations, and substitute the standard at 29 CFR 1910.106(e)(9)(iii) which provides

> 1910.106 Flammable and combustible liquids....
> (e)(9) Housekeeping: (iii) Waste and residue.
> Combustible waste material and residues in a building
> or unit operating areas shall be kept to a minimum,
> stored in covered metal receptacles and disposed
> of daily.

Respondent objected to this motion and submitted a brief in opposition. Ruling on this motion was reserved and the Secretary permitted to proceed with his proof.

The Respondent moved for the exclusion of all evidence reflecting communications between Respondent and the Union wherein Respondent's management employees may have admitted certain facts or conceded safety or health violations may have existed for the purpose of achieving the health and safety goals of the parties. This motion was not granted with the right reserved to Respondent to object for this same reason to specific questions when asked. It is pertinent here to point out that in general such discussions as Respondent refers to would be admissible to establish good faith but admissions by its employees at some date not germane to the issues being tried would not, standing alone, sustain a finding of a violation. In my decision in the matters before me in this case all findings of violations were based upon the testimony presented in the course of the hearing.

Respondent renewed its motion for a postponement of the hearing at the conclusion of the Secretary's opening statement. [A pre-hearing motion for postponement of the entire hearing had

been denied prior to the commencement of the hearing.] This motion was denied, however, Respondent was advised that:

> "...my ruling now should not preclude you from, at any stage of the proceedings, claiming surprise, and asking for a delay..." (Tr. 1-28)

In its prehearing statement the Union argued that Respondent should have been cited under Section 5(a)(1) of the Act and that the citation should be amended to reflect the "...serious, wilful and repeated violations of the Act by Respondent." During the course of the hearing the Union reiterated its position that all of the alleged violations were more serious than as cited by Respondent (Tr. 132, 366, 463, 675).

The Evidence

The parties stipulated that the full and accurate name of Respondent is General Electric Co., Inc. of the state of New York, that it is engaged in business affecting interstate commerce, and that it is the owner of the equipment and machinery involved in the alleged violations. At its Schenectady worksite the Respondent operates an industrial plant with 64 separate departments. Some departments or divisions operate at the main plant at 1 River Road as well as at an extension of the main plant, some 2-1/2 miles away on Nott Street, considered to be an integral part of the main plant. It employs approximately 27,000 people at its Schenectady worksite. The Citations were properly served and posted. As to the alleged violation of 29 CFR 1910.252(e)(1)(i), the employees working

on the stator frame were not wearing safety belts or lifelines and there was no guardrail on the stator frame, an item manufactured for interstate sale. There were previous Citations under this Act; i.e., December 2, 1971, February 29, 1972, October 2, 1972, and March 12, 1973, which were not contested and have become final orders (Exhibits C-1, 2, 3, and 4).

The inspection was accomplished by Compliance Officers John Nead and David Bernard (hereafter CO) following the complaint of the Union Safety Director Larry Rafferty. Mr. David Guilbault represented Respondent on the inspection and he was generally described as having overall area responsibility (Tr. 1-221, 236, 278, 543). He did not testify at the hearing. The several alleged violations will be treated under the applicable standard.

Serious Violations

29 CFR 1910.252(e)(1)

There is no dispute among the parties respecting the factual situation as it applies to the workmen on the stator frame (Ex. C-5). There had been previous instances of a similar nature called to Respondent's attention by the Union (Exhibit C-17). Since the inspection here in issue the employees are wearing safety belts with life line (Tr. 1-400). Mr. Robert Gidel, President of the Occupational Health and Safety Consulting Associates and former Program Operations Director of the Occupational Safety and Health Administration,

described the administrative steps in promulgating standards under the Act and identified ANSI Z-49.1, 1967[Safety in Welding and Cutting] as the source of 29 CFR 1910.252(e)(1). Further he testified that this standard had no application to the factual situation cited here (Tr. 2-228).

29 CFR 1910.29(a)(3)(i)

There was testimony that in Building 52, Bay A-8, the inspection party observed an electrically operated lift or powered platform (weldevator). A Compliance Officer, Mr. Bernard (hereinafter CO), rode the lift to the top and measured the height as 26 feet 10 inches. The base measurement of the lift was 5 feet 2 inches by 11 feet 5 inches, representing a cross (Tr. 1-254, 256, 605) and he estimated the unit weighed at least 3 tons (Tr. 1-256). This unit was not guyed or braced (Tr. 1-254, 437, 2-17) and had a swaying motion or lack of stability when elevated (Tr. 1-262, 436). For this demonstration 3 people rode it (Tr. 2-7). It had no wheels and rested on the floor, being moved about the plant by an overhead crane (Tr. 2-10). The lifting platform was open on the side parallel to the work (Tr. 1-437). No employees were observed using this lift but the CO was informed that two employees were affected by it (Tr. 1-255; 2-26).

At the time the Citation was drawn the CO was unaware of the definition of manually propelled mobile scaffold contained in 29 CFR 1910.21.[1/] In light of present knowledge the COs now do not consider the cited standard applicable to these facts. The hazard represented by this platform was of the elevated lift tipping or being knocked over by a crane (Tr. 1-438; 2-12). Testimony was also presented that in the demonstration ride the platform, when elevated and stopped, was 1-2 feet away from the work area (Tr. 1-436, 439, 607). In support of the Motion to amend the Complaint to charge this factual situation as a 5(a)(1) violation, a CO, with 10 years' experience as a safety engineer, stated that this was a recognized hazard in the industry because:

> "It would be readily discernible to the employers, and that since it was in such use, frequent use, that its obvious swaying, as it was elevated, would indicate a possibility of falling over, and I think that the fact that the--it is recognized in the industry that the dimensions should be at least one-fourth of the width that it would be elevated." (Tr. 1-608)

Further, that the basis of the 5(a)(1) charge was the instability of the powered work platform, based on the 4 x 1 rule (Tr. 1-757).

The Union Safety Director testified there are several Weldevators in this plant and he has observed them in use. Further, he has not

---

1/ 1910.21 Definitions
(g) As used in 1910.29, unless the context requires otherwise, manually propelled mobile ladder stand and scaffold (tower) terms shall have the meaning ascribed in this paragraph.
(11) Mobile scaffold (tower). A light, medium or heavy duty scaffold mounted on casters or wheels.
(12) Mobile. "Manually propelled."
(13) Mobile work platform. Generally a fixed work level one frame high on casters or wheels, with bracing diagonally from platform to vertical frame.

noticed any outriggers or outrigger frames.

Mr. Gordon Richardson, Vice President of M.D. Knowlton Co., manufacturer of Weldevators, testified that he was a 1946 graduate of Cornell University, School of Civil Engineering, with a major in structural design and employment in engineering allied positions to date. His Company had manufactured 75-100 Weldevators to date and sold them to government and private industry (Tr. 2-113). He had ridden the units at Respondent's plant and at their upper limits (maximum elevation 31 feet), there was between 1/2 to 1 inch sway (Tr. 2-111). His Company had received no complaints of any of these units tipping (Tr. 2-113), he had never heard of one tipping (Tr. 2-114) but he was aware of one at General Electric Company, building 52, upsetting when hit by the hook of a crane or the load (Tr. 2-114). The unit weighed about 3,500 pounds and was portable to the extent of using capable overhead lifting devices (Tr. 2-117). The 31 foot capacity unit was not provided with wheels or casters.

These units met New York State requirements that 50 pounds of force in any direction would not render it unstable and engineering calculations (Ex. R-9) showed that the point of instability was reached with 450 pounds of thrust applied at the maximum height (Tr. 2-121) from front to back. The non-portable Weldevators are sold with stabilizers and stabilizing devices on them (Tr. 2-124) which extend from the sides (the ends of the long dimension (Tr. 2-129)). The stabilizers are jack

screws in the end of the long dimension (Tr. 2-133, Ex. J-3) and he had never seen a Weldevator without stabilizers. Respondent's Building 52 superintendent stated that on the day of the inspection the jack screws were down to ground level (Tr. 2-145, 175).

29 CFR 1910.27(d)(2)

This standard involved fixed metal ladders and there were 4 instances of alleged violations cited. One ladder, 24 feet 4 inches in height, Bay A-10, Building 52 (Ex. C-6, Tr. 1-548) was not properly offset, two ladders in Bay A-32, Building 52, 24 feet 4 inches and 35 feet 6 inches in height respectively and one ladder 25 feet 11 inches in height in Bay K-1, Building 273 did not have either cage, landing platform or ladder safety device (Tr. 1-52, 53). All of these ladders were straight without offsets (Tr. 1-52, 53), and ended at catwalks (Tr. 1-703). They were used for access by overhead crane operators and maintenance personnel (Tr. 1-164, 327). The ladders shown in exhibit C-6 had a platform offset at the 8 foot 7 inch level. The Union Safety Director had previously called these ladders to the attention of Respondent (Tr. 1-328, Ex. C-17, C-18) and on December 2, 1971, Respondent was cited for a violation of 29 CFR 1910.27(d)(1)(ii) involving a 21 foot 2 inch ladder on a machine (Ex. C-1) which was corrected by an offset and landing platform. Two weeks was alloted to abate this violation.

29 CFR 1910.243(c)(1)(i)

In Bay A-25, Building 52, two employees were using a hand held, portable, abrasive grinding tool that was unguarded (Tr. 1-57; C-7).

The employee shown in Exhibit C-7 is wearing goggles. The wheel was 5 inches in diameter and bonded and turned at 9,000 rpm. It was estimated by the Union Safety Director that several hundred employees used grinders of this type, some of them guarded (Tr. 1-401) and that Respondent was experiencing difficulty in getting these guards (Tr. 2-22). Respondent's shop foreman related that at the time of the OSHA inspection about 50% of the wheels in Building 52 were guarded and that they had a program to progressively guard all these grinders (Tr. 2-146). He was aware that the unguarded grinders were in violation of the standard. Part of the problem in guarding these grinders was that some of them were 25-30 years old and guards were not available (Tr. 2-183) and this raised the problem of additional cost for equipment to be removed for obsolescence. However there were approximately 200 grinders in inventory and only about 30 grinder employees per shift, so that Respondent felt it had enough guarded grinders.

29 CFR 1910.243(b)(1)(ii)

This alleged violation involved a hand held portable pneumatic chisel being utilized in Bay A-9, Building 52. At the time of the inspection an employee, at the request of the Union Safety Director, procured one of these tools from his work station and demonstrated that he could eject the chisel a distance of 5-9 feet and that there was nothing retaining the chisel in the tool (Tr. 1-61, 127). This type

of chisel (or chipping-hammer) operates with 90 pounds of air pressure against a piston which strikes the chisel being pushed back against the piston. Thus the chisel only works when the chisel is meeting resistance or being held in the tool by the operator's hand (Tr. 1-337). Respondent does have retainers on peening hammers used by welders but not on this type of chipping hammer. Respondent has about 200 employees at its plant using this type of tool (Tr. 2-17).

The superintendent of Respondent's Building 273 related that he observes chipping hammers in use daily and has used them himself; that he has been employed by Respondent for 33 years, and that in the number of years he has observed this tool in use he has never seen a chisel eject. He described the method of inserting the chisel and working with the tool (Tr. 2-49). He attempted to duplicate the demonstration described by the Secretary's witnesses as well as actually work the tool and have the chisel eject and after several efforts he succeeded in having the chisel eject from a work situation and also just firing away with it (Tr. 2-52). The tools that were in use in his building had been manufactured by 3-4 different manufacturers but they were all basically the same in construction and operation.

Each of the above described alleged violations was classified as serious (Tr. 1-546, 553, 610, 614) in that Respondent, with reasonable

dilligence, could have known of the violation and there was substantial probability that death or serious injury could result from such condition (Tr. 1-547, 551, 554, 555, 608, 614). In computing the penalties to be assessed Respondent for these alleged violations the Secretary gave no credit for good faith, size or history and determined each item charged should be abated immediately, except as to Item No. 3 respecting fixed metal ladders, respondent was given 9 working days to abate.

Other than Serious Violations

29 CFR 1910.252(b)(4)(ix)(c)

Testimony was elicited from the Secretary's witnesses that in Bay A-12, Building 52, there was an arc welding machine with lengths of lead and ground cable that were properly joined by bolting, however, the ground cable was exposed and uninsulated at the connection (Tr. 1-95). One employee was using this equipment. This unguarded connector created an electrical shock problem in that if the bare connector was grabbed by the welder he would experience a shock (Tr. 1-392). However if he was holding the insulated electrode lead he would not be shocked by touching the uninsulated ground lead (Tr. 1-478). This condition was considered to be of little gravity (Tr. 1-632) and no penalty was proposed. The alleged violation was to be abated immediately.

29 CFR 1910.27(c)(4)

The alleged violation of this standard involved a metal pipe running parallel to a fixed metal ladder rung at the 17 foot level and only 2

inches directly behind the rung and obstructing the foot. This ladder was in Building 52 (Tr. 1-209). This was considered a moderate hazard for which abatement credit was given. Abatement was to be accomplished in two weeks.

29 CFR 1910.27(f)

In Bay B-24, Building 52, there was a fixed metal ladder that had been bent to the side (Ex. C-15). Mr. Nead testified that the bent portion involved the bottom 4 rungs and was severe (Tr. 1-99). The danger inherent in this bending was a possibility that the ladder had lost some of its stability and could give way (Tr. 1-99). However he did not know if the ladder had been weakened (Tr. 1-99). He did not check its stability (Tr. 1-210) and it seemed pretty solid to hand grip. The Union Safety Director was of the opinion that the hazard created by a bent ladder was one of an employee falling. Mr. Bernard was of the opinion that the hazard was in weakening a rung where it was welded. However he did not push or pull it (Tr. 1-763) or otherwise test it (Tr. 1-771). There was no penalty proposed for this condition and abatement was to be accomplished in two weeks.

29 CFR 1910.106(d)(2)(i)

In Bay A-18, Building 52, the COs observed a partially filled, uncovered 55 gallon metal container sitting on the floor. It was estimated there was about 10 gallons of "Rust-Ban" liquid and some rags and paper in the bottom of the drum. The liquid was identified

by employees as a paint thinner which was combustible (Tr. 1-213). This had been dumped in the container as waste. No test was performed on the liquid matter by the COs (Tr. 1-241). The determination that the contents of the container were combustible was based on a reading of the label of a can of "Rust-Ban" shown to the COs by employees of Respondent (Tr. 1-395, 763). The Union Safety Director testified that the drum "...seemed to be partially filled, down to the bottom, with the rags in there and apparently some papers and what appeared to be paint or oil base or something, and oily surface..." This situation was determined by Mr. Bernard to be of moderate gravity and the hazard involved was one of fire. Immediate abatement was felt to be reasonable. Mr. James Corcoran, Respondent's Superintendent of Building 52, testified that there was a drum, as described by the Secretary, and this drum was used to catch mud and water overflow from the sediment tank at the "shot blast" facility. Normally this drum sits under the "shot blast" machine but on the day of inspection it was 10-15 feet away (Tr. 2-147). However he placed the drum and "shot blast" machine as being in Bay B-18 although there also was such a machine in Bay A-18 (Tr. 2-170).

29 CFR 1910.176(a)

In Bay-C (furnace room), Building 52, the COs reported there were numerous loaded pallets scattered randomly all over the floor in a storage area where mechanical equipment was required to move

said material and further that this material blocked personnel using aisles and tending the furnace (Tr. 1-100). However there were no aisle markings and thus, in the event of fire, the haphazard storage could impede employees egress (Tr. 1-102). Mr. Nead testified that permanent aisle markings should have gone from the entrance door to each fire exit (Tr. 1-116) based on the requirement to have permanent aisles and passageways in all places of storage or business where employees work. He was unable to remember how it was determined that mechanical material handling equipment was used in this area (Tr. 1-211). The Union Safety Director testified that this area was inspected at the request of the operator of an overhead crane (Tr. 1-397). Mr. Bernard determined this was of a low level of gravity and the hazard was that aisle markings are to separate employee walking areas from mechanical equipment moving areas to prevent the employee being struck and to delineate the storage areas (Tr. 1-642). Abatement was to be accomplished in two weeks with Respondent's resources (Tr. 1-653). Mr. Corcoran testified that forklift trucks were used in this area (Tr. 2-164), and that on the date of the inspection there were no aisle markings (Tr. 2-166).

29 CFR 1910.27(b)(1)(iii)

In Bay H-17, Building 273 the COs testified there were fixed metal ladders, attached to large machines, which had rungs 12 inches wide (Tr. 1-102, 399). One of Respondent's employees testified that

he slipped off one of these rungs, sustaining a back injury, and that a wider rung might have helped him (Tr. 1-511). Since the inspection this condition has been abated. Mr. Bernard determined this was a hazard of very low level and it was a hazard because the 12 inch rung left insufficient room for an individual's feet (Tr. 1-644). No penalty was proposed for this violation and Respondent was granted two weeks to abate. For all of the nonserious violations Respondent received no credit for good faith, size or history but an abatement credit was given.

Repeated Serious Violations

29 CFR 1910.133(a)(1)

Mr. Nead observed two of Respondent's employees in Bay K-13, Building 52 operating a pneumatic hammer, to break up concrete, to the left of the aisle the inspection party was in and they were not wearing any eye protection (Tr. 1-72). These employees were clearly visible to the inspectors. As soon as the COs started talking to the employees about their lack of eye protection Respondent's representative advised them to cease their operation until they put on eye protection. Before entering and also inside this building they saw signs stating "Mandatory that you wear eye protection in the building at all times." They also observed two maintenance employees not wearing glasses in this building. One of them had his glasses in his pocket and the

other in his tool box. The hazard from failing to wear protective glasses was of particles of concrete or dust entering the eye. This alleged violation was classified as a repeated violation because Respondent had been previously cited for violating the same standard.

The Union representative testified that he considered the safety glass rule as being observed in the two buildings inspected, although he had observed violations of the rule (Tr. 1-442), and that the rule about wearing safety glasses is posted on all doors (Tr. 1-454). The two employees using the pneumatic hammer were not directly supervised. One instance was cited of an employee being discharged for refusing to wear his protective glasses (Tr. 1-538).

Mr. Bernard testified Respondent had previously been cited for violations of this same standard in December 1971 (Ex. C-1) in Buildings 61 and 273 in that grinding and chipping employees were wearing safety glasses but they did not have side shields (Tr. 1-590). In assessing a penalty for the current alleged violation it was determined by a committee of the Secretary's employees that this situation presented the possibility of serious physical harm which carried a maximum penalty of $1,000.00 for which no reduction was warranted. Since this was the second citation under the same standard the $1,000.00 would be multiplied by two for a proposed penalty of $2,000.00. Respondent was accorded no credit for good faith since the Act had been in effect two years and it had received

numerous citations (Tr. 1-601). They also received no credit for history because of their previous violations. Mr. Bernard had observed that Respondent's rule respecting the use of protective eye glasses was pretty well complied with and was prominently posted in all buildings (Tr. 1-694).

Respondent's employee, Mr. Bruce F. Henkel, one of the two employees involved in the eye protection citation, was called by Respondent. He testified that he was a heavy construction laborer employed in Utility Operations throughout the plant in Schenectady, that he had been employed for 7 months and he had experience using a pneumatic hammer antedating his employment. On the date in question he was wearing safety glasses without side shields but since that date he has been supplied with safety glasses with side shields. At the beginning of his employment he was informed of the rule respecting safety glasses and issued such glasses. There was a possibility that on the date in question he may have removed his glasses to clean them.

Repeat [Other than Serious] Violations

29 CFR 1910.22(a)(1)

The COs testified that in Bay A-7, Building 52 two welders were working and they had their welding leads and air compressor lines scattered all over (Exs. C-8 and 9). The leads could have been rolled up and wrapped on metal wall mounts on the wall behind the work. Other welders walking around the area were tripping. This situation created

a slipping and tripping hazard (Tr. 1-62). The welding operation involved a cradled work piece about 3 feet off the ground. The scattered lines were in the welding work area and not in an aisle.

The Union Safety Director testified that the Union had struck over the issue of wrapping up leads and hoses. This situation was considered a perennial problem in Building 52 and had been called to Respondent's attention previously by the Union (Ex. C-17 and 21). This was not a problem in all buildings at Respondent's plant and management had recognized that it was a day to day problem in Building 52. He described the operating method of welders to uncoil all the lead and hose required to do the job at its furthermost extension and work back toward the outlet. He identified the work in the area as that being performed by the welder shown in Exhibits C-8 and 9 and also that there were sub-arc welders on top of or inside a stator frame (Tr. 1-468).

Mr. Bernard testified that there was a hazardous accumulation of welding leads and compressed air hoses in Bay A-7, Building 52 which constituted a tripping hazard (Tr. 1-560). It was his opinion that the coils on the floor were excessive. On a previous occasion in December 1971 (Ex. C-1) Respondent was cited for 8 instances of violation of this same standard, and in February 1972 (Ex. C-2) one instance of an identical violation.

Mr. Corcoran testified that the employee, Mr. Campbell shown in Exhibits C-8 and 9, was working in the area to his right, 3 other welders

were working in the area to his left and 4 chippers, using air lines, were to the right of Mr. Campbell (Tr. 2-140). Further, that all the lines shown in Exhibits C-8 and 9 were being utilized at the time the inspection party visited the cited area. He agreed with Mr. Rafferty that welders usually uncoil the maximum amount of lead and work back (Tr. 2-155). The area involved in Exhibits C-8 and 9 was a work area and not an aisle.

Mr. Gidel testified that the standard under which Respondent was cited was a sanitation standard adopted from ANSI Z4.1-1968 (Tr. 2-263).

29 CFR 1910.157(a)(2)

Mr. Nead described the situation that gave rise to the citation under this standard as a wall mounted fire extinguisher with air hoses wrapped around it so that it could not be seen and obstructing its use (Tr. 1-64; Ex. C-4). The pictured scene was after Respondent's representative had immediately removed the hose, in a matter of seconds, and dropped it to the floor. He also described a previous citation for an obstructed fire extinguisher reflected by Exhibit C-4. This was the only instance of an obstructed fire extinguisher noted on this inspection.

Mr. Rafferty testified that the depicted fire extinguisher was in Bay B-19, rather than A-19, and was the only obstructed extinguisher noted that day (Tr. 1-355). However, on other occasions he had called similar situations to Respondent's attention (Exhibits C-16, 17, 19, 21, and 23). Respondent had corrected most of the referred to instances (Tr. 1-358).

Mr. Bernard testified that he observed several coils of hose draped over the cited fire extinguisher, partly obscuring it from view, although it was visible from where he stood 20-25 feet away, and interfering with its use in an emergency. Further that there was a table in front of it and cans stored against the wall under it. When this situation was discussed Respondent's representative reached in and uncovered the extinguisher in a moment's time. This was the only observed instance of a fire extinguisher violation. Although the likelihood of injury was low a penalty of $100.00 was assessed because under a proposed revision of the Labor Department's Compliance Operations Manual repeated violations carry a minimum penalty of $100.00 (Tr. 1-749).

29 CFR 1910.252(e)(2)(iii)

Mr. Nead testified that while walking in an aisle in A and B Bays, Building 52, he observed employees arc welding alongside the aisle without using any protective screens for other employees in the area who were welding and chipping (Tr. 1-67, C-11 and 12). Exhibit C-12 shows an unutilized screen to the right of the picture. There were 6 other employees in the immediate area (within 50 feet) who were exposed to the welding rays and potential eye damage (flash burn). Some of the employees were wearing head shields and using them while welding and others had no protection from welding rays. Respondent had previously been cited for a violation of the same standard (Ex. C-3) at the Nott Street plant (Tr. 1-94).

Mr. Rafferty observed that he had previously brought this situation to Respondent's attention (Exhibits C-17, 19, 21, and 23).

Mr. Bernard testified that it was felt Respondent, with the resources at its command, could abate this violation immediately. No effort was made to ascertain what these resources were. The principal problem caused by inadequate screening was that persons passing by the welding area and in the adjacent work area were unprotected against the welding rays. On this inspection he saw 2 employees welding with one screen between them.

Mr. Corcoran testified that in the area in question there were 5 weld screens although none was being used. Generally there were about 4 people in that work area at any given time.

Willful Serious Violation

29 CFR 1910.23(c)(1)

Mr. Nead testified that in Building 273 he observed 3 work situations for which he cited Respondent. In one situation in Bay H-17 an employee was observed working about 12 feet above the floor on the upper side of a stator frame, without a railing, drilling holes. In addition the large industrial drill was leaking oil and creating a slippery surface (Ex. C-13). All the while Mr. Nead watched this scene the employee was holding on to the drill frame. There was no indication of any other safety precaution taken for this employee. He considered

the place where the employee was drilling, as a work surface because that was where he performed his work. He did not consider this to be serious at the time.

In Bay K-8 there were 3 welders on temporary structures 6 feet 8 inches above the floor without midrails on all sides of the work surface (Ex. C-14, Tr. 1-83, 156). Mr. Nead described a scaffold as a temporary structure put up for no more than one day (Tr. 159). The structure he observed on this inspection was a metal framework with wood plant flooring (Tr. 156). These structures were variously described as platforms and scaffolds. Mr. Rafferty described them as scaffolds (Tr. 378).

In Bay K-11 a powered work platform was sitting alongside the aisle, not in use, and without standard railings. It had 6 inch deep sockets or openings in the metal floor for a removable railing but no one knew where the railing was (Tr. 1-87). The platform used a scissors technique for elevating the lift over 10 feet. However Mr. Nead did not know how high it was elevated when in use.

Respondent had previously been cited under this same standard for no guardrails (Ex. C-4). The same representatives of Respondent, who accompanied the inspectors in March 1973, had also been present on the previous inspection that resulted in the citation in evidence as C-4.

Mr. Rafferty testified that he observed the employee on the stator frame in Bay H-17, without guard rails or a life line, the

scaffolds in Bay K-8 with welders working on them without midrails where there was an additional hazard of the welders working on very hot material where the welder might accidentally burn himself and back off the platform because of the lack of a midrail. Further he had seen the powered lift in Bay K-11 used at heights of 6, 8 and 10 feet and on occasion had used it himself. When working on the powered lift the welder would weld a piece of angle iron from the platform, which was up against the work, to the area being worked on (Tr. 1-377) to provide a temporary guard.

On previous occasions Mr. Rafferty had brought the issue of scaffold railings to management's attention (Tr. 1-379, Ex. C-16, 23) and on one occasion a grievance was filed respecting employees working on the top of a stator frame. He described the violation referred to in Ex. C-16 as a molten steel pouring operation where slag rolls off the back of a furnace and employees work around a floor hole without railings to prevent them falling into the hole through which the molten steel flows (Tr. 1-483).

Mr. Gary Kingsland, an employee of Respondent, testified that he was a horizontal radial drill press operator who worked on top of stator frames [as illustrated in Ex. C-13] as they came through the shop on an assembly line. He stated they varied in length from 19 to 38 feet and were about 15 feet in diameter. The frame sits on blocks so that the top, being worked on, is 15-18 feet above the floor. A single stator frame may remain in the work area for up to 200 drilling hours. Occasionally it is repositioned by rolling and

other employees perform a variety of jobs on it. There is no flat surface to work on and underfoot is a lot of oil from the drill and cooling and tapping oils. On occasion he had complained to management about this and was permitted to wash the frame down to remove the oil. Sometimes, on request, he is provided a light, portable, aluminum scaffold butted up against the frame but only reaching half way up to his work area. Since the inspection a rope is provided as a means of quick escape.

Mr. Bernard testified that Respondent had been previously cited for a violation of this same standard (Ex. C-1, 4). While conducting the inspection, Mr. Rafferty called his attention to the employee working on the stator frame. Mr. Bernard climbed the drill press ladder and measured the top of the frame as being 14 feet above the floor. He did not see any scaffolding or railing around the stator frame and the employee was not wearing a life line, safety belt or other means of personal protection.

He determined that a fall from the stator frame would result in serious physical harm or death and that the employee so exposed was plainly visible to management officials. A fall from either of the platforms in Bay K-8 or the work platform in Bay K-11 would produce the same serious consequence. He determined that the alleged violation of this standard was willful because Respondent had been cited for a

similar violation about March 12, 1973, and also on December 2, 1971, (Tr. 1-621, Exhibits C-1, 4). Further he knew that the Union and Respondent had discussed the same subject on occasions.

The penalty was arrived at by taking the unadjusted penalty of $1,000, without allowing any credit for good faith, history or size, and multiplying this by a factor of 5. The multiplier represented the consensus view of the Secretary's committee (Tr. 1-630). Immediate abatement was ordered because of the previous citations Respondent had received and the resources at its command.

Mr. Leland Weller, superintendent of Respondent's Building 273, testified the scaffolding in use on the day of inspection had angle-iron top and mid-rails on three sides and an angle-iron top and chain mid-rail on the fourth (front) side. He equated the angle iron with a 2 x 4. Eye bolts were welded into the uprights so that the chain could be snapped to the bolt (Tr. 2-44). A chain is used for ease of entry from a ladder onto the scaffold work space.

He described the powered work platform in Bay K-11 as being a special application, 4 x 6 foot platform with a fixed back and removable posts on the sides to which chain was hooked to form the top and mid-rails. The work or front side of the platform had a telescoping arrangement to permit the platform to be moved in against the work and this side was unguarded. The employees were instructed to use the rails. This platform was used about once a month. None of these scaffolds were affixed to the building.

Mr. Gidel testified that the standard here under consideration was derived from ANSI A12.1-1967 which pertained to real estate and had nothing to do with stator frames or work products. Any attempt to enlarge the applicability of the standard meant it was no longer a consensus standard which the Secretary was authorized to adopt. However, on cross-examination he conceded that this was his interpretation and ANSI A12.1-1967 did not contain the words real estate.

Findings of Fact

1. Respondent is one of the largest manufacturers in the United States.

2. It employs thousands of employees at its Schenectady, N.Y. plant where many types of manufacturing occur. The plant site is not under the administrative control of any centralized authority but is controlled by several segments of the Corporation from its corporate headquarters. Purely local matters such as plant maintenance are centralized locally.

3. The inspection of March 1973 was limited to Buildings 52 and 273 where turbine generators are manufactured (Tr. 1-268).

4. Stator frames are large component parts of turbine generators that move through the plant on a wheeled frame with the capacity to be rotated to permit work to take place on all sides. The cited stator frame was in a horizontal position and in this position it was 15 feet 3 inches above the floor (Tr. 1-46). Two employees were welding on top of the frame (Tr. 1-46) and they were not wearing any safety device and there

was no other protective device around the workplace. (Tr. 1-48). Abatement was directed to be accomplished immediately and the workmen now wear safety belts tied off.

5. Weldevators are moveable elevators with working surfaces that rise to differing heights and the cited unit had a capacity of 31 feet. Its base was "T" shaped with the top of the "T" being a steel beam 11 feet 5 inches with leveling or stabilizing jacks at its ends and the body of the "T" consisted of a frame about 5 feet 2 inches square. It weighed in excess of 1 and 1/2 tons. Immediate abatement was ordered.

6. The unit was not guyed or braced and achieved its stability by virtue of its gross weight and base dimensions with stabilizing screw jacks.

7. The unit may be upset by being struck high up by moving overhead equipment.

8. Respondent had 4 fixed, metal ladders measuring from 24 feet 4 inches to 35 feet 6 inches which were straight, uncaged and uninterrupted. One of them had an offset platform. There were no ladder safety devices in use. Abatement was directed in less than 2 weeks.

9. Respondent had unguarded high speed portable grinders with grinder faces in excess of 2 inches. It also had a sufficient number of guarded grinders to equip the employees on each shift. On the day of inspection two employees were using grinders without guards. Immediate abatement was ordered.

10. Chipping hammers used in Respondent's buildings 52 and 273 were not equipped with tool retainers. Immediate abatement was ordered.

11. Respondent was aware of the factual situations set forth in Findings No. 4 thru 10.

12. Each of the described situations may produce serious injury.

13. The maximum penalty of $1,000 was recommended for each of these items.

14. An arc welding machine in building 52 had an uninsulated connection which created a minor shock hazard.

15. In Building 52 there was a fixed metal ladder with a foot obstruction 2 inches behind a rung at the 17 foot level.

16. In Building 52 there was a fixed metal ladder which had been bent to one side. The distortion was minimal, involving the bottom two rungs without evidence of weakening or instability.

17. There was a metal 55 gallon drum containing an unidentified liquid, rags and paper near the "shot blast" machine in Building 52.

18. There were no aisle markings in Bay C, Building 52, which was used for palletized storage of material by mechanical equipment.

19. Respondent had 2 large industrial machines which had metal ladders affixed to them and said ladders had rungs 12 inches wide.

20. Two of Respondent's employees were breaking up concrete with pneumatic hammers in a building where protective eye glasses were required and at the time of inspection they were not wearing any protective eye glasses.

21. There were welding leads and compressed air hoses on the floor in Bay A-7, Building 52. This was a work area and there were no aisles going through the area where the leads and hoses were scattered.

22. A hand held fire extinguisher in Bay B-19 of Building 52 had an air hose draped over it.

23. Employees in the vicinity of welding in Bays A & B, Building 52 were not protected against welding rays by welding screens or appropriate goggles.

24. In Bay H-17, Building 273, an employee was working 14 feet above the floor, on top of a work product, without any form of protection against falling.

25. In Bay K-8, Building 273, there were two scaffolds where the chain mid-rail was not correctly positioned. Welders were using these scaffolds.

26. In Bay K-11, Building 273, there was an unused elevator work platform without any guard of any type although its design permitted removeable posts at the corners. No one was using this platform on the day of inspection.

Discussion

Before considering the individual standards charged to have been violated there are several general areas that it is pertinent to consider.

After having moved at the beginning of the trial to withdraw its charge that a manually propelled scaffold was in violation of 29 CFR

1910.29(a)(3)(i), to which the Union objected, the Secretary, midway through the trial, moved to withdraw its original motion to withdraw and substitute therefore a motion to amend the charge to a violation of Section 5(a)(1) of the Act. The first problem arose with the Union's objection to the Secretary withdrawing a citation. During the Union's cross-examination of Mr. Nead, the Union was permitted, over the objection of the Secretary, to elicit the facts surrounding the citation under 29 CFR 1910.29(a)(3)(i).

The Act provides that the Secretary or his authorized representative shall issue a citation to the employer and that the rules of procedure of the Review Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings authorized under Section 10(c) of the Act.[2/] The rules of the Commission provide that affected employees may elect to participate as parties at any time before the commencement of the hearing before the Judge.[3/]

Thus it is clear from the provisions of the Act that only the Secretary may initiate a citation alleging a violation of the Act. There is no delegation of this authority to any other party or agency.

[2/] Section 9(a).

[3/] 29 CFR 2200.20.

However, once a citation is issued, may the Secretary unilaterally withdraw it? In Secretary of Labor v. Gurney Industries, Inc , OSHRC Docket No. 722, the Review Commission held that "To deprive any party of a hearing on a justiciable issue properly raised is to deny fair and due process to that party." The Union was a party to the hearing in this case and the Secretary's citation properly raised a justiciable issue. If the Secretary elects not to go forward with the proof as to any part of a citation any other party may elect to establish by exhibits or examination of witnesses such part of the citation.[3a/] Thus, where the Secretary moves to withdraw a citation, and there is reasonable objection by an affected employee or authorized employee representative, the motion must be denied.

The question of the right to amend a citation was considered by the undersigned in Secretary of Labor v. Reserve Roofing and Sheet Metal, Inc., OSHRC Docket No. 1796 wherein it was observed that

> "...the Review Commission will permit any amendment in the Complaint that is designed to correct typographical or ministerial errors or clarify a Citation without changing the basic factual allegations thereof provided in all instances that the Respondent is not mislead [sic] or prejudiced thereby.

Thus as to the proposed amendment of the citation respecting the 55 gallon drum from 29 CFR 1910.106(d)(2)(i) to 29 CFR 1910.106(e)(9)(iii), such an amendment was in the nature of clarification and did not change the basic factual allegation. Further such amendment did not prejudice

---

3a/ Textile Workers Union of America, AFL-CIO Petitioner v. National Labor Relations Board, Respondent, 294 F.2d 738; Marine Engineers Beneficial Association No. 13 v. National Labor Relations Board, 202 F.2d 546.

Respondent's position. However, with respect to the move by both the Secretary and the Union to amend item number 3 of the citation for serious violation from 29 CFR 1910.29(a)(3)(i) to a General Duty violation under Section 5(a)(1) of the Act, for serious violation, the same may not be said. Respondent's defense of the standard charged was ready at the time of trial and was based on the position that the scaffold cited was not mobile. Violations of Section 5(a)(1) imply a recognized hazard within the meaning of the Act, i.e., a hazard known generally throughout the industry. It is obvious that the defense to a 5(a)(1) charge is different from the defense to a specific standard. While this issue may well be mooted by the Secretary's belated move in his reply brief to have this item of the citation dismissed for failure to carry his burden of proof it is felt necessary and proper to comment on such a proposed amendment. The rules of the Review Commission provide that the Secretary may amend the citation or proposed penalty by setting forth in the complaint the reasons for amendment and state with particularity the change sought.[4/] Since the Secretary's proposed amendment came during the trial it is not covered by a specific Review Commission rule and thus the Federal Rules of Civil Procedure apply.[5/]

[4/] 29 CFR 2200.33(a)(2).

[5/] 29 CFR 2200.2(b).

Under the Federal Rules of Civil Procedure the granting or denying of an application to amend is within the discretion of the trial judge, whose ruling will not be disturbed on appeal [or administrative review] unless there has been an abuse of discretion[6/] and leave to amend should be freely given. Only when there is some good reason therefor should a court refuse to permit an amendment to a complaint.[7/] The fact that the Secretary's move to amend is late in coming or may be motivated by counsel's afterthought as to the best theory upon which to proceed is not, in this instance, sufficient reason to deny the amendment.[8/] The only issue is, has Respondent been substantially prejudiced by the Secretary's move to amend the specific standard to a violation of Section 5(a)(1).

Respondent's counsel avers that he would be put to a disadvantage in that he had proceeded with his defense to a specific standard on the basis that there was no standard applicable. Further he could proceed with counter proof that this scaffold meets proposed revised standards respecting a "moment tipping calculation" but he was uncertain if any employer could discern what a 5(a)(1) situation was in this instance. There was no offer to establish specific instances of

---

6/ Witmayer et ux. v. United States, 118 F^2 808.

7/ Green et al v. Wolf Corp., 50 F.R.D. 220.

8/ Green v. Wolf Corp., supra; Wright and Miller, Federal Practice and Procedure, Section 1943 and cases cited at footnote #86.

serious prejudice[9/]; that a delay in the hearing would not cure any element of surprise or due process defect[10/], or the unavailability of evidence or witnesses. Thus Respondent is not shown to have been prejudiced. [This should not be confused with Respondent's prehearing request for postponement of hearing in order to adequately prepare its defense].

In a recent Review Commission decision[11/] it was held that even though Respondent had been cited for a Section 5(a)(1) violation, if the evidence presented, established a violation of Section 5(a)(2), i.e., a specific standard promulgated thereunder, the citation would be considered amended to conform to the proof. However 3 days later[12/] the majority members of the Review Commission affirmed a decision by Judge Oringer, holding, in part, that where a citation of a violation of a specific standard under Section 5(a)(2) of the Act failed he would not determine whether there had been a violation of Section 5(a)(1) of the Act since that question was not before him. Commissioner Cleary dissented, citing authorities and Rule 15(b) of the Federal

---

9/ Deakyne v. Commission of Lewes, 416 F^2 290.

10/ Watson v. Cannon Shoe Co., 165 F^2 311.

11/ Secretary of Labor v. Brisk Waterproofing Co., Inc., OSHRC Docket No. 1046.

12/ Secretary of Labor v. B. Heckerman Iron Work, Inc., OSHRC Docket No. 111.

Rules of Civil Procedure urging great liberality in permitting amendments to pleadings and resting on Secretary of Labor v. Brisk Waterproofing Co., Inc., supra. He concluded:

> "I believe it equally proper to amend a complaint in which a Section 5(a)(2) violation is alleged so as to allege a violation of Section 5(a)(1)..."

While the foregoing is persuasive of the opinion in the Review Commission, they are not exactly analogous situations to the instant case. Here we have a proposed amendment on the record. The purpose of the Act cannot be served by permitting the actions of the Secretary's agents to defeat the achievement of safe and healthful working conditions. So long as the Respondent is on notice of the charge, permitted adequate time to cure suprise and prepare its defense and the amendment flows from the same factual situation the Judge may grant a motion to amend at any stage of the proceeding or on his own initiative amend to conform to the evidence pursuant to Rule 15 of the Federal Rules of Civil Procedure within the limitations previously expressed.

The authority, among the parties, to initiate an amendment to the pleadings is vested solely in the Secretary respecting the citation and complaint and in the Respondent respecting the notice of contest and answer. While the Union is a party in all respects it may not on its own motion move to amend the pleadings. This position is not inconsistent with my earlier determination that the Union may assume the Secretary's burden of proof with respect to an item

of the citation and go forward with evidence at the hearing to establish such violation, already cited by the Secretary. To thus take over and direct the Solicitor of Labor's efforts as the Secretary's representative would be a divestiture of the right granted the Solicitor by Commission Rule 22(b) [29 CFR 2200.22] to control all matters respecting the interest of the Secretary.

The specific violations will be discussed in the order in which they were presented in the evidence beginning on page 11.

The only issue to be resolved respecting the alleged violation of 29 CFR 1910.252(e)(1)(i) is whether the area on top of the stator frame may be considered a platform or scaffold within the meaning of the standard. I am unaware of any other case that has come before this Commission where this particular standard has been involved. Mr. Gidell testified that the cited standard, which stemmed from ANSI Z-49.1 1967, Safety in Welding and Cutting, did not cover the factual situation involved here. There was argument by the Union that the stator frame workplace is one contemplated by the Act. Certainly there can be no argument with the position that a man working on top of a stator frame is covered under the Act. However that is not the issue here. The issue is as previously stated. The words of the standard must be interpreted in the light of their specialized meaning to the special group they affect but also they must be considered in their everyday sense. There is no credible evidence before me nor

any common understanding that the surface of a work piece, some distance above the floor, may be construed as a platform, scaffold or runway. For this reason I find the standard at 29 CFR 1910.252(e)(1)(i) not applicable to the factual situation involved here.

However, having reached the conclusions that the Judge may, on his own motion, conform the pleadings to the proof and that there is no specific standard which covers this factual situation, should I amend this citation to one of a violation of Section 5(a)(1) of the Act rather than 5(a)(2). In a recent decision[13/], Judge Oringer held that the Secretary's reliance upon specific standards in lieu of Section 5(a)(1) of the Act was fatal to his case despite the fact that the record evidence was such that it may well have resulted in a proven violation of Section 5(a)(1) of the Act. This case was directed for review by Commissioner Cleary and the issues included the question of whether the record would sustain a finding by the Commission that Respondent violated Section 5(a)(1) of the Act and then amend the pleadings under Rule 15(b) of the Federal Rules of Civil Procedure, assuming the Judge did not err in holding there was no violation of the specific standard. In the instant case I think an amendment by me would be improper. The Review Commission may, on its own initiative,

---

13/ Secretary of Labor v. Granite-Seabro Corp., OSHRC Docket No. 923.

amend the pleadings to conform to the proof as I specified in Secretary of Labor v. Reserve Roofing and Sheet Metal, Inc., supra but to take over the function of the Secretary and change his legal basis for proceeding would mean an abandonment of the Review Commission's adjudicatory role and the adoption of the role of a regulatory agency.[14/] If the Secretary had sought such an amendment and Respondent had been granted due process I would have granted the motion. Absent such a request I will not amend the pleadings at this stage.

In light of the testimony presented by Respondent, regarding item number 2 of Citation for Serious Violations, which was not controverted by any of the Secretary's witnesses, an unguyed or unbraced Weldevator is not recognized in heavy industry as a hazard. In fact, I question if this elevator type of equipment constitutes a hazard at any time. The only testimony regarding an accident was an instance in Respondent's plant where a crane moving through the plant struck a Weldevator. In his brief the Secretary conceded it had not sustained the 5(a)(1) burden of proof and moved the dismissal of this citation. With this I concur.

The alleged violation of 29 CFR 1910.27(d)(2) involved 4 instances of fixed metal ladders. Respecting paragraph 1 of that item the evidence establishes that the section of the standard requiring ladder sections

---

14/ Secretary of Labor v. Wetmore and Parman, Inc., OSHRC Docket No. 221.

to be offset was not complied with. I feel that the standard is poorly drawn [and not improved in the proposed revision thereof] and as pointed out in Respondent's brief there is an apparent conflict between subsections (d)(1)(ii) and (d)(2). However the apparent conflict does not render (d)(2) vague. While the standard is not specific that ladder sections end at a landing platform, the only logical conclusion to draw from the standard is that there must be sections to offset if a platform is required and a ladder section beginning at a landing platform must be offset from that below.

Paragraphs 2 and 3 of this item, pertaining to ladders 24 feet 4 inches, 35 feet 6 inches and 25 feet 11 inches respectively, alleged the ladders had no cage, landing platform well or ladder safety device and the evidence so established.

The ladders in question were utilized by a very small group of Respondent's employees and the probability of accident was remote. However injury due to falling from any of them would invariably be serious. Ladder violations may be considered to be an extensive problem (4 of 4 observed were cited). Certainly Respondent was on notice that this was a problem as reflected by the testimony of Mr. Rafferty. Considering Respondent's size, the gravity of the violation, its history under the Act and its good faith it is determined that the maximum penalty is appropriate. Considering the number of ladders in Respondent's plant the abatement date set is unrealistic. Abatement of all ladder violations under this standard should be accomplished by January 1, 1974.

With respect to Item 4 of the Citation for Serious Violations there is no dispute that two employees were using unguarded grinders on the day in question. While Respondent may consider this an isolated occurrence, the fact that it is conceded that not all grinders in use were guarded put Respondent on notice that it did have a hazard present and it had not effectively prevented this violation from occurring. If all unguarded tools were out of service until guarded and an employee had removed the guard for his own purpose I would look at the violation differently. While Respondent testified that only guarded tools were in use this testimony was hardly credible. Such was not the case here. Respondent had unguarded wheels in its inventory and knew that they were available for use. Respondent's argument that this tool is not the type of machine embraced by the standard does not stand scrutiny. The "machines" involved in the standard in issue are those using portable abrasive wheels. Obviously the machines in this instance are portable hand held grinding wheels.

Is this a serious violation of high gravity? Certainly the shattering of an unguarded wheel is always possible and when this occurs there is a substantial possibility that serious physical harm may flow from it. It is shown from the record that the employee using the unguarded grinding tool was wearing protective goggles and

the wheel was of the bonded type decreasing the chance of it shattering. Considering the number of employees engaged in grinding operations on each shift and the number of grinders guarded, the incidence of exposure is low. Accordingly I conclude this violation is of a low gravity. Thus a penalty of $250.00 is more appropriate than $1,000.00.

With respect of Item 6 of the Citation for Serious Violation there is no argument that Respondent was in violation of the standard requiring retainers on pneumatic powered hand tools. Respondent may argue that the requirement of a retainer is conditioned upon the pneumatic holder ejecting the tool while being utilized for the purpose for which it was intended. However the standard simply requires a retainer if the tool may be ejected. The testimony presented does not establish great liklihood of tools being ejected while being utilized as designed but the demonstration shows that under optimum demonstration conditions the tool may be ejected. Admittedly the CO's did not see this occur under work conditions but I consider this type of violation a static violation as discussed in an earlier decision[15/] and the violation exists by virtue of the physical characteristics of the item in violation.

15/ Secretary of Labor v. Armor Elevator Co., OSHRC Docket No. 2007.

Although as demonstrated the ejected chisel was capable of inflicting serious physical harm the designation of a violation as Serious is based on its potential for injury under working conditions. The testimony that under working conditions tools would rarely eject from their holder and even if it happened the tool would only "dribble" out is both credible and persuasive. It is my decision that at most this is a De Minimis violation.

With respect to the other than Serious Violations, Item No. 1 thereof pertained to an exposed welding conductor. There is no conflict in the evidence that while properly connected, the connection was not properly insulated. There does seem to be some confusion regarding the cables by virtue of the designation of one of them as the ground cable. Mr. Rafferty clarified that point. There is a ground wire which grounds the welding machine. This was not involved in the citation. The welding is done through electricity flowing out one cable (electrode) to the weld point where it meets resistance, makes the weld and returns to the welding machine through the other cable that is grounded to the work. This was the cable that was the subject of the citation. The testimony was that, under the proper circumstances, a shock would be received by anyone touching the uninsulated connection. Thus the violation exists. The nonassessment of a penalty is appropriate.

Item No. 2 of the citation pertained to lack of foot clearance behind the rung of a fixed metal ladder. The testimony established that there was an obstruction behind the ladder rung which prevented

the safe positioning of a foot on that rung. Respondent made no effort to show a variance request for this violation. The standard exists to be complied with and Respondent's course of action is not to ignore it. I agree with the position of the Union that the evidence clearly establishes that this is a serious violation and in accord with my earlier discussion I am amending the pleadings to so charge and find. I do not consider the amending of a citation to increase the penalty or change the category thereof to be assuming a regulatory role but rather consider that role restricted to amendments that go to save a defective citation. In reaching this decision I am not unmindful of the Review Commission decision in Secretary v. Wetmore & Parman, OSHRC Docket No. 221 (January 22, 1973) and affirmed in Secretary v. Dundas Pallet Company, OSHRC Docket No. 266 (February 14, 1973). In the latter case the Commission, on its own motion, raised the issue of whether the non-serious violation alleged met the test of a serious violation and determined that under Wetmore & Parman, supra it was "... without authority, absent the consent of the Secretary, to find a violation of a degree higher than that charged by the Secretary." In Wetmore & Parman, supra, the Commission concluded:

> "...the Commission is without authority to find an employer in willful violation of the Act's requirements when the Secretary has not charged the employer with such violation, and the issue is not tried by the parties." (underscoring supplied).

In its reasoning the Commission pointed out at page 5 of its opinion that the Secretary had not consented to the amendment and for reasons listed believed it was without authority, absent the consent of the Secretary, to find a violation of a degree higher than that charged by the Secretary. It is patent from the foregoing that the cited and instant cases are distinguishable. The cited cases pertain to untried issues to which the Secretary had not consented. This is a far cry from the requirement for due process that I have referred to. In the instant case the Union consistently advanced the position, both before and during hearing, that the citation should be amended to reflect more serious citations than the Secretary had alleged and the facts respecting a serious violation were fully presented in open hearing. This Commission cannot present two faces to those who would seek to establish precedential value to its decisions by conforming citations to proof to correct ministerial or typographical errors or otherwise clarify a citation and refuse to do so where an issue was fully litigated without a denial of due process merely because it seeks to follow the traditional role of a court. The Review Commission is not a traditional court and enjoys that liberality in its proceedings that Congress desires administrative tribunals to have. However relatively few employees are exposed to this single ladder at the 17 foot rung and the incidence of exposure is low. The proposed penalty of $100.00 is appropriate.

Item No. 3 of this citation pertained to the stability of a bent ladder. The applicable standard requires ladders to be maintained in a safe condition. Safe meant different things to different people. To one CO it meant stable, to another it meant solid rungs and to the Union Safety Director it meant no fear of falling from missing a rung. The testimony was that the ladder seemed stable to grip, the rungs appeared to be solid. The evidence presented, including the picture of the ladder in question, does not support a determination that this is an unsafe ladder. The Secretary has failed to sustain his burden of proof.

Item No. 4 of this citation was amended to charge a violation of 29 CFR 1910.106(e)(9)(iii). This is a subsection pertaining to flammable and combustible liquids. The term in the standard referring to "Combustible waste material and residues..." refers to flammable and combustible liquid waste material and residues. Thus the only question before me is whether the liquid in the 55 gallon drum was combustible or flammable. The CO's did not test the liquid and determined it was combustible on the basis of what employees in the area said. Accordingly it is determined that the Secretary failed to meet its burden of proof that the drum in question contained a flammable or combustible liquid.[16/]

16/ Secretary of Labor v. Cole, Division of Litton Industries, OSHRC Docket No. 863 and cases cited therein.

Item No. 5 pertained to aisle markings. Mr. Mead indicated he initiated this allegation of a violation because there were no aisle markings at all in this room and "...because individuals go in there and work, and the Federal Register says you will have permanent aisles and passageways in all places of storage or business." Mr. Bernard testified that if powered industrial trucks are used there must be marked aisles. However the standard cited only requires markings for permanent aisles. During the Government's cross examination of Respondent's Building 52 Superintendent the following exchange took place:

> "Q. The standard cited, 176(a) states that 'Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.'
>
> With respect to obstruction in the aisles, did you observe any at the time?
>
> A. There weren't any aisles marked in that room at that time.
>
> Q. So naturally the permanent aisles and passageways are not appropriately marked?
>
> Mr. Cummings: Objection. I don't think that it has been determined that there are any permanent aisles."

This is the crux of the issue. There was no testimony presented by the Secretary that there were any permanent aisles in the storage room. The testimony was directed to the fact that there was no pattern or order to the palletized loads in the room. However it was not established

that there was a requirement for aisles. Respondent had presented evidence that this was a temporary storage situation at best, being utilized during alterations. The violation is not established.

The final item of this citation involved the width of rungs on a fixed metal ladder attached to a large machine. The facts are not in dispute. A review of the standards discloses that portable single wooden ladders should have 14" rungs at 30 feet, extension wooden ladders 14-1/2 inch rungs up to 28 feet and 16 inches up to 40 feet, portable metal ladders require a minimum rung of 12 inches and fixed metal ladders were required to have 16 inch rungs.

No logical explanation was advanced for nor am I aware of the reason for the difference between portable and fixed metal ladders. The testimony regarding an employee fall and the safety that an additional 4 inches of rung might have afforded is not credible. The only requirement that makes a safety sense is that there be room for both feet. If 12 inches is safe on portable ladders it is just as safe on a fixed ladder. Accordingly I hold that compliance with 29 CFR 1910.27 (b)(1)(iii) is not necessary or appropriate to provide a safe or healthful employment and place of employment as required of standards by Section 3(8) of the Act.[17/]

17/ The Secretary published in the Federal Register September 6, 1973, 38 F.R. 172 a proposed revision of 29 CFR 1910 including a revised Section 1910.27c(a)(3) that the minimum clear length of rungs [for fixed metal ladders] shall be 12 inches.

The next citation also requires a general discussion prior to considering the specific standard. This is so because Respondent is charged with a repeated violation which raises the issue of whether Respondent is a single entity nationwide as contended by the Union; at its geographical location in Schenectady, New York as contended by the Secretary or within its separate Divisions within the Schenectady plant as contended by Respondent, for the purpose of determining if a violation is repeated. For an answer to this question we must look to the Act and Code of Federal Regulations, the legislative history being silent on this point. In the Act sections 2(b)(1), 4(a), 5(a)(1), 8(a)(e), (g)(2) and 13(a) make reference to "places of employment," "a workplace," "a place of employment," and "any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed." 29 CFR 1903.2(a) and (b), 1904.2 and 1904.12(g)(1) refer to "each establishment" and define an establishment as:

> "...a single physical location where business is conducted or where services or industrial operations are performed...Where distinctly separate activities are performed at a single physical location...each activity shall be treated as a separate physical establishment."

In Appendix A to 29 CFR 1904 it is provided that:

> "Every employer is required to prepare a summary of the occupational injury and illness experience of the employees in each of his establishments."

Thus it is readily apparent that it was not contemplated that a legal entity should be treated as one employer, for all purposes of the Act, nationwide. To the contrary it is clear that one employer may have more than one establishment for the purpose of the Act. A practical approach to the question supports the position of the Secretary that like activities in one geographical location are one establishment. Thus all Respondent's acitivities considered by it to be its Schenectady industrial plant with cross utilization of personnel, whether on the same, contiguous or separated parcels of land, are considered a single establishment. It does not matter that they are broken down for corporate purposes into separate divisions with a certain amount of autonomy and report directly from industrial division to a nigher corporate level in another city. To thus fragmentize the workplace would permit employers to contrive artificial work units to defeat the long range purposes of the Act. The determination must be based on the facts shown, which in this case show that from a safety point of view Respondent's Schenectady industrial operation is a single establishment.

This is not to imply that Respondent does not have a valid position for its argument based on the regulatory proviso dealing with "separate activities...at a single physical location." However this does not apply to the same employer but rather covers the situation where several employers are supplied from a single source or work on the same workplace.

As to the specific violation alleged, the credible evidence establishes that there was noncompliance with the standard regarding protective eye glasses. The testimony of one of the employee's involved that he may have removed his glasses momentarily to talk to the CO is hardly credible. All members of the inspection party testified to the contrary. Respondent had previously been cited for an almost identical situation involving a chipping hammer. Since the same standard involving an almost identical factual situation was involved in the two violations there can be no question but that they are repeated. However in the earlier instance in December 1971 the violation was considered other than serious while in this instance it was considered serious because of the possibility of being struck in the eye by flying concrete. In computing the appropriateness of the penalty Respondent's size, history and good faith were not considered to warrant any reduction of the penalty. There can be no disagreement the Respondent's size precludes it receiving any penalty adjustment based thereon. However Respondent's history under the Act and good faith cannot be measured in the vacuum of pure mathematics, i.e., prior violations automatically mean a poor history and disagreement or poor communications between the employer and employees mean a lack of good faith. In evaluating the Respondent's history we must consider the scope of its plant and activities at its Schenectady industrial site and in considering its good faith we must consider its overall safety program. Thus

we have an establishment where full time first aid facilities are present, there are employees who devote their full time to industrial safety and, with respect to the particular violation, the COs and the Union Safety Director considered Respondent's protective glasses program to be a good one. I also may not lose sight of the fact that although this does not come under the heading of an isolated occurrence as defined in a recent decision by Judge Burroughs and approved by the Review Commission August 13, 1973[18/] it is due in major part to employee lapse. The fact that the Union may have previously called this to the attention of Respondent is not a factor to be considered in determining the repeated status of the violation. Repeated refers only to items previously cited by the Secretary of Labor under this Act, that is, under the same standard and the same factual situation. Accordingly I find a penalty of $100.00 to be more appropriate.

The next citation pertained to repeated nonserious violations. Item No. 1 involved an alleged tripping hazard. The citation and the testimony pertain to hoses in a work area. The standard at 29 CFR 1910.252(e)(1)(ii) requires that:

> "Welders shall place welding cable and other equipment so that it is clear of passageways, ladders and stairways."

This is clear recognition that there is a different degree of care required to protect fellow employees walking in designated passageways

---

18/ Secretary of Labor v. The Verne-Woodrow Co., OSHRC Docket No. 1607.

from those working in familiar surroundings and that welders of necessity must have their welding leads strung out to some degree.[19/] The testimony was that it is customary to take down enough lead to reach to the furthermost point of work and come back to the point requiring a weld, nearest to the outlet. The testimony and exhibits do not show that the hoses here cited were not kept in a clean, orderly and sanitary manner. At best this standard is subjective and its violation is virtually solely in the eye of the beholder. While there is argument that Respondent has left welding leads strewn around in the past the initial question I have is whether in the work situation depicted the leads were representative of a violation and I find they were not.

Item No. 2 of the repeated nonserious allegations pertains to a fire extinguisher that was not accessible. The citation is amended to conform the location of the extinguisher to that established by the proof. The testimony by all witnesses present during the inspection was that Respondent's representative removed the draped hose in a matter of seconds and the extinguisher was then immediately available. However in the case of fire extinguishers the word immediately has a special meaning that does not contemplate any delay in removing the extinguisher for use. A fire extinguisher is positioned for one purpose only and

---

19/ See 29 CFR 1910.252(b)(4)(ii) wherein it is provided that: "...Coiled welding cable shall be spread out before use to avoid serious overheating and damage to insulation."

that purpose does not include serving as a clothing hook or any other type of material hook or support. Immediate abatement of this violation was reasonable and proper and was accomplished by Respondent before the CO had an opportunity to photograph it in its violative condition. A penalty of $100.00 is considered appropriate.

Item No. 3 pertained to welding protection for employees working nearby or walking in the aisle adjacent to the welding area. The fact of the violation is not disputed. While there was some testimony that safety glasses provided a measure of protection against welding rays, other testimony was that eye injury had been sustained in the past even while wearing such glasses. In the preceding subsection(ii) of the standard detailing the specifications for protectors it is provided that lenses shall bear some permanent distinctive marking by which the source and shade may be readily identified.[20/] Thus I determine that safety glasses were not shown to meet the goggle requirement for protection against welding glare. However again we are confronted with the situation where Respondent has supplied its employees with welding screens and its employees failed to properly position them to protect co-workers not actually doing the welding. For the reasons previously stated I find an appropriate penalty to be $100.00.

20/ 29 CFR 1910.252(c)(2)(ii)(h).

The final citation to be considered pertains to a willful serious violation. The Review Commission has defined "willful" as conduct that is "intentional, knowing or voluntary as distinguished from accidental, and it may be characterized as conduct marked by careless disregard."[21/] The Secretary's instructions to his employees is not in disharmony with this decision.[22/] The violation alleged in Bay H-17 raises the same question respecting the work surface as was raised with respect to Item No. 1 of the citation for serious violation and fails for the same reason, i.e., the stator frame is not a platform.

The alleged violations in Bay K-8 are clear. Much time and discussion was spent over one side of a platform that had a chain arrangement as a mid-rail and little time on the fact that two nonwork sides had no mid-rail of any kind, including chain. However this leaves unresolved the issue of whether the described structure is a platform or a scaffold. If the structure is a platform it must have a standard railing or equivalent where the platform is 4 feet or more above ground,[23/] whereas if the structure is a scaffold, guardrails are required on open sides and ends of platforms more than 10 feet above the ground.[24/]

21/ Secretary of Labor v. Wetmore and Parman, Inc., (January 17, 1973) supra. Secretary of Labor v. Intercounty Construction Corp., (January 29, 1973) OSHRC Docket No. 919.

22/ Compliance Operations Manual, Chap. VIII, B.4.a. (1) and (2).

23/ 29 CFR 1910.23(c)(1).

24/ 29 CFR 1910.28(a)(3).

Since the structure in issue is more than 4 feet but less than 10 feet the standard applicable is critical. We must thus look to the definition of terms applicable to the standards in question.

> "29 CFR 1910.21 Definitions
> (a) As used in §1910.23...terms shall have the meaning's ascribed in this paragraph.
>
> * * *
>
> (4) Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.
>
> * * *
>
> (f) As used in §1910.28, unless the context requires otherwise, scaffolding terms shall have the meaning ascribed in this paragraph.
>
> * * *
>
> (27) Scaffold. Any temporary elevated platform and its supporting structure used for supporting workmen or materials or both."

As pointed out by Respondent, application of the principle of ejusden generis, to the illustrations of what a platform is, coupled with a reading of section (a) of the standard at 1910.21, leaves me with the impression that this has reference to permanent type structures as distinguished from the obviously temporary nature of scaffolds. The structures used by Respondent vary in height and configuration depending on the particular workpiece they are built around or against. They are dismantled and rebuilt by a regular scaffold crew.

A review of some 20 cases involving citations under the standard here in issue reveals that all but one involved runways, loading platforms, storage areas, platforms in slaughtering plants or the top of an existing structure within the plant.

The one exception is the case cited in support of the Secretary's position[25/] where Judge Harris stated:

> "The definition of 'platform' conveys the meaning that a degree of permanence exists either in the method of construction thereof or the use to which it is put. This is contrasted with the specific reference to temporary erection which appears in the definition of 'scaffold.' The former applies to work platforms in a plant which are an integral part of fabrication, processing, assembling and similar work functions while the latter refers to any temporary structure made necessary in repair, alteration, construction and similar work operations, the need for which ends when the repair, construction or alteration is completed. The mere fact that a platform which is used as an integral part of production may be easily dismantled and re-assembled does not operate to render it 'temporary' within the meaning of 29 CFR 1910.21(f)(27). The platforms in Respondent's main assembly plant were regularly used as an integral part of its production of modular homes... The use to which these elevated structures were put, renders them platforms within the meaning of 29 CFR 1910.28(a)(3) and Respondent's failure to provide them with guardrails and toeboards was in violation of the standard at 29 CFR 1910.23(c)(1)."

I do not find myself in disagreement with Judge Harris regarding permanent and temporary structures. The question is how is the structure used? Judge Harris found in his case that

---

25/ Secretary of Labor v. U.S. Homes, Inc., OSHRC Docket No. 367.

although temporary in construction the structures were used permanently. In the instant case the structures were temporary in construction and temporary in use, being dismantled after each workpiece had been completed and reerected for another workpiece.

The final guardrail allegation pertains to a powered work platform in Bay K-11. This elevator was not seen in operation by the CO. It had sockets for the purpose of erecting demountable guardrails (or equivalent) and although these were not located at the time of inspection the credible testimony was that Respondent's instruction to its employees was that the elevator was not to be used without rails. I am thus confronted with the situation I addressed in Secretary of Labor v. Armor Elevator Co., Inc., supra, where the work situation is non-static in nature, i.e., it requires an affirmative act by the employee to create the violation. The unguarded powered work platform standing alone is insufficient to establish the violation. The Secretary has recognized this by providing in his Compliance Operations Manual[26/] that "As a general rule working conditions that allegedly violate the OSHA safety and health standards ... shall be cited only when actually observed by a CSHO during the course of an inspection..." This has added significance when we consider Section 9(a) of the Act providing:

26/ Chapter 12, C. 1. (page X-5).

> "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." (Underscoring supplied)

Thus, the date of occurrence of a noncontinuing violation, such as the lack of guardrails, becomes important in determining the limit on the Secretary's authority to cite. While there was testimony that this elevator had been operated in the past without guardrails, the COs did not see it so operated and the record does not establish a violation within the citable period.

In concluding this decision I would be remiss if I did not note the cooperation of counsel for all parties in simplifying the issues both during the hearing proper and in their briefs, and thus being of immeasurable assistance to me in the preparation of this decision. I was favorably impressed by the knowledge of the Act and standards displayed by Mr. Rafferty and the enthusiasm with which he approaches safety and health in the workplace.

Conclusions of Law

1. Respondent was engaged in a business affecting interstate commerce.

2. The Review Commission has jurisdiction over the cause of action.

3. Only the Secretary of Labor may initiate a citation alleging a violation of the Act.

4. Once a citation is issued any party to the proceeding may present evidence in support of any part thereof.

5. The citation may be amended at any stage of the proceeding prior to the decision if the Respondent is afforded due process.

6. Respondent was not in violation of 29 CFR 1910.252(e)(1)(i) and thus has not violated Section 5(a)(2) of the Act.

7. The Weldevator cited as a violation of 29 CFR 1910.29(a)(3)(i) under Section 5(a)(2) of the Act [proposed to be amended to a violation of Section 5(a)(1) of the Act] was not in violation of any part of Section 5 of the Act.

8. Respondent was in violation of the standard found at 29 CFR 1910.27(d)(2) and thus has violated Section 5(a)(2) of the Act. This violation was serious with a high level of gravity. However considering the size of the Respondent's plant the abatement date was unrealistic and is more appropriately set at January 1, 1974.

9. Respondent was in violation of Section 5(a)(2) of the Act by failing to comply with the standard found at 29 CFR 1910.243(c)(1)(i). This violation was serious with a low level of gravity. The abatement date was reasonable.

10. Respondent was in violation of Section 5(a)(2) of the Act by failing to comply with the standard at 29 CFR 1910.243(b)(1)(ii). This violation was De Minimis.

11. Respondent was in violation of Section 5(a)(2) of the Act through its failure to comply with the standard at 29 CFR 1910.252 (b)(4)(ix)(c).

12. Respondent was in violation of Section 5(a)(2) of the Act through its failure to comply with the standard at 29 CFR 1910.27(c)(4). This violation was serious but the penalty of $100.00 initially proposed is appropriate considering Respondent's good faith and the low level of gravity of this violation. The abatement date is reasonable.

13. Respondent was not in violation of Section 5(a)(2) of the Act respecting the standard at 29 CFR 1910.27(f) since the ladder in question, while bent, is not shown to be unsafe.

14. Respondent was not in violation of Section 5(a)(2) of the Act respecting the standard at 29 CFR 1910.106(e)(9)(iii) since the Secretary did not sustain its burden of proof.

15. Respondent was not in violation of the Act with respect to 29 CFR 1910.176(a) since the Secretary did not sustain its burden of proof.

16. Respondent was not in violation of Section 5(a)(2) of the Act with respect to 29 CFR 1910.27(b)(1)(iii) since that standard was not properly promulgated.

17. Respondent's industrial operations at 1 River Road and Nott Street represent a single establishment for citation purposes under the Act.

18. Respondent was in violation of Section 5(a)(2) of the Act through its repeated failure to comply with the standard at 29 CFR

1910.133(a)(1). This violation was serious because of the potential for eye injury due to being struck by a foreign object. The abatement date was reasonable.

19. Respondent was not in violation of Section 5(a)(2) of the Act with respect to 29 CFR 1910.22(a)(1) since it was not established that in a heavy industrial operation of the type here under consideration the welding leads were not clean and orderly in a sanitary condition.

20. Respondent was repeatedly in violation of Section 5(a)(2) of the Act with respect to 29 CFR 1910.157(a)(2) in that a fire extinguisher was not readily accessible and immediately available.

21. Respondent was repeatedly in violation of Section 5(a)(2) of the Act with respect to 29 CFR 1910.252(e)(2)(iii) in that employees were not protected against welding glare. This was an other than serious violation and immediate abatement is proper.

22. Respondent was not in violation of Section 5(a)(2) of the Act with respect to 29 CFR 1910.23(c)(1) in that the stator frame in Bay H-17 and the scaffolds in Bay K-8 are not platforms as contemplated by the standard, and the powered work platform in Bay K-11 was not operated in violation of the standard.

Order

Based on the foregoing Findings of Fact and Conclusions of Law and the record as a whole, now therefore it is ORDERED that:

1. The motion to amend the citation for other than serious violations by changing the standard cited in item number 4 from 29 CFR 1910.106(d)(2)(i) to 29 CFR 1910.106(e)(9)(iii) is granted.

2. The motion to amend the citation for serious violation by changing item number 2 from the standard cited, 29 CFR 1910.29(a)(3)(i), to a violation of Section 5(a)(1) of the Act is granted.

3. The motion to dismiss item number 5 of the citation for serious violation is granted.

4. Item number 2 of the citation for other than serious violations is amended, on my own motion, to cite this as a serious violation.

5. With respect to the citation for serious violations as amended, items numbered 3, 4 and 6 are affirmed. The penalty for item number 3 is affirmed. The penalty for item number 4 is reduced to $250.00. The penalty for item number 6 is reduced to $0. Item number 5 was dismissed on motion of the Secretary and items number 1 and 2 are vacated and the proposed penalties therefore are vacated. The abatement date for item number 3 is extended to January 1, 1974. Abatement proposed for items number 4 and 6 are affirmed.

6. With respect to the citation for other than serious violations as amended, items number 1 and 2 are affirmed in all respects. Items number 3, 4, 5 and 6 and the proposed penalty therefore are vacated.

7. With respect to the citation for a serious repeated violation and the proposed abatement therefore the citation is affirmed and the proposed penalty is reduced to $100.00.

8. With respect to the citation for other than serious repeated violations, items number 2 and 3 and the proposed abatement therefore are affirmed. The proposed penalty for item number 2 is affirmed and the penalty for item number 3 is reduced to $100.00. Item number 1 and the proposed penalty therefore is vacated.

9. With respect to the citation for willful violation it is vacated in all respects.

Charles K. Chaplin

CHARLES K. CHAPLIN
Judge, OSHRC

Dated: NOV 19 1973
Washington, D.C.

Commission's Decision dated April 21, 1975

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

April 21, 1975

CERTIFIED #
RETURN RECEIPT REQUESTED

IN REFERENCE TO SECRETARY OF LABOR v.

GENERAL ELECTRIC COMPANY

OSAHRC DOCKET NO. 2739

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa
Regional Solicitor
U. S. Dept. of Labor
1515 Broadway
Room 3555
New York, New York 10036

FOR EMPLOYER

Edward J. Cummings, Jr., Esq.
Roland C. Radice, Counsel
Steam Trubine-Generator Division
General Electric Company
One River Road
Schenectady, New York 12345

FOR EMPLOYEES

Boren Chertkov, Esq.
I.U.E., Radio & Machine
Workers, AFL-CIO Local #301
1126 - 16th Street, N. W.
Washington, D. C. 20036

AMICUS CURIAE

Bertram Robert Cottine &
Stephen Early, Repres. of
Health Research Group
2000 P Street, N. W. Suite 708
Washington, D. C. 20036

Judge Charles K. Chaplin, OSAHRC
1825 K Street, N. W.
Washington, D. C. 20006

OF COMMISSION DECISION

To wit: See attached.

FOR THE COMMISSION

William S. McLaughlin

WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. GENERAL ELECTRIC, Respondent.	OSHRC DOCKET NO. 2739

DECISION

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

CLEARY, Commissioner:

This case is before us on directions for review issued separately by Chairman Moran and Commissioner Van Namee under section 12(j) of the Occupational Safety and Health Act of 1970.

I. Background

On March 21 and 22, 1973, the Steam Turbine-Generator Products Division of General Electric's facility in Schenectady, New York, was inspected by two U.S. Labor Department safety inspectors. The Steam Turbine Division is housed in Buildings 52 and 273, and provides work for approximately four thousand of the more than twenty-seven thousand people employed by General Electric in the greater Schenectady area.

Subsequent to the March 1973 inspection, General Electric was served with six citations alleging serious violations of the Act: 1/ one citation alleging six "other than serious" items as violations; one citation alleging a serious repeated violation; one citation alleging

1/ The Occupational Safety and Health Act of 1970 [29 U.S.C. §651 et seq. (1970)].

three "other than serious" items as repeated violations; and one citation alleging a willful serious violation. Concurrently with service of the citations, General Electric received a notification of proposed penalties in total amount of $14,800. A hearing was held in June 1973 in Schenectady, New York, before Administrative Law Judge Charles Chaplin. The Judge affirmed three of the citations for serious violations; the citation for a serious repeated violation with a reduced penalty; two items of the citation for non-serious violation and two items of the citation for repeated non-serious violations. The Judge dismissed one of the citations for serious violation; four items of the citation for non-serious violation; one item of the repeated non-serious violation; and the willful serious violation. Penalties totalling $1,650 were assessed. The following chart summarizes the status of each violation and proposed penalty at the time the case was called for review and also the disposition thereof by the Administrative Law Judge. It should facilitate discussion of the issues.

STATUS OF ALLEGED VIOLATIONS AT TIME CASE CALLED FOR REVIEW

29 CFR §1910 2/ Standard Violated	Key Words Describing Alleged Violation	Nature of Violation	Proposed Penalty	Disposition by Administrative Law Judge	Assessed Penalty
.252(b)(4)(ix)(c)	Bare leads and conductors, welding machine	Non-serious	0	Affirmed	0

2/ Since all alleged standards violations were taken from 29 CFR Part 1910, only the numbers to the right of the decimal point are used in showing section designations.

.27(c)(4)	Ladder clearance	Non-serious	100	Amended to serious by ALJ's motion and affirmed	100
.27(f)	Side rails of fixed metal ladder bent	Non-serious	0	Vacated	
.106(d)(2)(i)	Open 55 Gallon Drum partially filled with combustible liquid	Non-serious	100	Allowed amendment to allege .106(e)(9)(iii) violation. Vacated	
.176(a)	Permanent aisles and passageways not marked	Non-serious	0	Vacated	
.27(b)(1)(iii)	Fixed metal ladder with less than 16 inch rungs	Non-serious	0	Vacated	
.252(e)(1)(i)	Stator frame railings. Fall protection	Serious	1,000	Vacated	
.29(a)(3)(i)	Improper height base ratio of scaffold	Serious	1,000	Motion to Amend to §5(a)(1) violation granted. Secretary moves to withdraw allegation based on failure of proof. Vacated	
.27(d)(2)	Ladder offset, ladder caging	Serious	1,000	Affirmed	1,000

.243(c)(1)(i)	Safety Guard on portable abrasive wheel	Serious	1,000	Affirmed	250
.179(f)(4)(vii)	Overhead Crane brake	Serious	1,000	Dismissed on Motion of Secretary	
.243(b)(1)(ii)	Tool retainer on hand-held pheumatic chisel	Serious	1,000	Changed characterization of violation from serious to de minimis and affirmed	
.22(a)(i)	Welding leads creating tripping hazard	repeat Non-serious	500	Vacated	
.157(a)(2)	Fire Extinguisher	repeat Non-serious	100	Affirmed	100
.252(e)(2)(iii)	Welding Screens	repeat Non-serious	1,000	Affirmed	100
.133(a)(1)	Eye Protection	repeat Serious	2,000	Affirmed	100
.23(c)(1)	Fall Protection Stator Frame, Platforms 6' 10" lacked standard rails, Powered Work Platform lacked standard rail	willful Serious	5,000	Vacated	

II. Issues Directed or Presented for Review

Chairman Moran has directed review and invited submissions on the following issues:

(1) Did the Judge err in concluding that "if the Secretary elects not to go forward with the proof as to any part of a citation any other party may elect to establish by exhibits or examination of witnesses such part of the citation?" (Section 1910.29(a)(3)(i) 3/ Improper height base ratio of scaffold.)

(2) Did the Judge err by his disposition of that portion of the citation alleging a violation of the Act for failure to comply with 29 CFR §1910.27(c)(4)? 4/ (Ladder clearance; raised from non-serious to serious.)

(3) Was the Judge's duty to conduct a fair and impartial hearing (Rule 22) compromised by the action reflected by the following excerpt from the opinion (p. 54) ". . . the evidence clearly establishes that this is a serious violation and in accord with my earlier discussion I am amending the pleadings to so charge and find" (emphasis in the original).

3/ 29 CFR §1910.29 Manually propelled mobile ladder stands and scaffolds (towers).

(a) General requirements

* * *

(3) Work levels. (i) The maximum work level height shall not exceed four (4) times the minimum or least base dimension of any mobile ladder stand or scaffold. Where the basic mobile unit does not meet this requirement, suitable outrigger frames shall be employed to achieve this least base dimension, or provision shall be made to guy or brace the unit against tripping.

4/ See footnote 18 infra.

(4) Was the said action of the Judge permissible in view of the Act's provisions that charges of violations thereof shall be made by the Secretary of Labor?

Commissioner Van Namee has invited submissions on the following additional issues:

(1) Whether the trial Judge committed reversible error in vacating the alleged non-serious violation of 29 CFR §1910.27(b)(1)(iii) 5/ under the circumstances of this case?

(2) Whether the trial Judge committed reversible error in finding a serious repeated violation of 29 CFR §1910.133(a)(1) 6/ since respondent had made eye protection conveniently available to its employees?

(3) Whether the trial Judge committed reversible error in finding respondent in repeated violation of 29 CFR §1910.157(a)(2) 7/ and 29 CFR §1910.252(e)(2)

5/ 29 CFR §1910.27 Fixed ladders.

* * *

(b) Specific features - (1) Rungs and Cleats

* * *

(iii) The minimum clear length of rungs or cleats shall be 16 inches.

6/ 29 CFR §1910.133 Eye and face protection.

(a) General. (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. . . .

7/ 29 CFR §1910.157 Portable fire extinguishers.

(a) General requirements -

* * *

(con't.)

(iii) 8/ on the basis that respondent's Schenectady industrial complex and its various satellite operations constituted a single establishment for purposes of the Act?

In addition to those issues directed for review by the Commission both the Secretary and Local No. 301 (IUE), an authorized employee representative, have preserved issues which require discussion and disposition. 9/ They have taken exception to the parts of the Judge's decision which held:

7/ (Con't.)

(2) Location. Extinguishers shall be conspicuously located where they will be readily accessible and immediately available in the event of fire. They shall be located along normal paths of travel.

8/ 29 CFR §1910.252 Welding, cutting, and brazing.

* * *

(e) Protection of Personnel

* * *

(2) Eye Protection

* * *

(iii) Protection from arc welding rays. Where the work permits, the welder should be enclosed in an individual booth painted with a finish of low reflectivity such as zinc oxide (an important factor for absorbing ultraviolent radiations) and lamp black, or shall be enclosed with noncombustible screens similarly painted. Booths and screens shall permit circulation of air at floor level. Workers or other persons adjacent to the welding areas shall be protected from the rays by noncombustible or flameproof screens or shields or shall be required to wear appropriate goggles.

9/ Respondent did not request review of any portion of the Judge's decision.

(1) That section 1910.252(e)(1)(i) 10/ did not apply to the top of a Stator Frame;

(2) That the violation of section 1910.243(b)(1) 11/ was of a de minimis nature;

(3) That complainant failed to meet his burden of proof with respect to section 1910.106(e)(9)(iii) 12/ since the liquid in the fifty-five gallon drum was not tested to see if it was combustible; (Issue preserved only by the Secretary of Labor.)

10/ 29 CFR §1910.252 Welding, cutting, and brazing.

* * *

(e) Protection of personnel - (1) General - (i) Railing - A welder or helper working on platforms, scaffolds, or runways shall be protected against falling. This may be accomplished by the use of railing, safety belts, life lines, or some other equally effective safeguards.

11/ 29 CFR §1910.243 Guarding of Portable power tools.

* * *

(b) Pneumatic powered tools and hose - (1) Tool retainer - A tool retainer shall be installed on each piece of utilization equipment which, without such a retainer, may eject the tool.

12/ 29 CFR §1910.106 Flammable and Combustible liquids.

* * *

(e) Industrial plants -

* * *

(9) Housekeeping

* * *

(iii) Waste and residue. Combustible waste material and residue in a building or unit operating area shall be kept to a minimum stored in covered metal receptacles and disposed of daily.

(4) That the evidence clearly established a repeat violation of section 1910.22(a)(1); 13/

(5) That the evidence clearly established a willful serious violation of section 1910.23(c)(1). 14/

On December 14, 1973, the Union Petition for Discretionary Review, asked that the Commission review the Judge's Decision and Order with regard to the following additional issues:

(1) That the Judge erred by finding that there was no serious violation of section 1910.29(a)(3)(i), 15/ amended to a violation of section 5(a)(1) (29 U.S.C. §654(a)(1)), notwithstanding record evidence establishing that the scaffold in question created a general duty hazard to employees;

13/ 29 CFR §1910.22 General requirements.

* * *

(a) Housekeeping (1) All places of employment, passageways, storerooms and service rooms shall be kept clean and orderly and in a sanitary condition.

14/ 29 CFR §1910.23 Guarding floor and wall openings and holes.

* * *

(c) Protection of open-sided floors, platforms and runways. (1) Every opensided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent . . .) on all opensides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever beneath the opensides, (i) Persons can pass or, (ii) There is equipment with which falling materials could create a hazard.

15/ See footnote 3 supra.

(2) That the Judge erred in dismissing the citation for a violation of section 1910.27(f), 16/ by overlooking record testimony of credited witnesses that the hazard created was that of an employee misjudging, slipping, and failirg rather than of stability of a bent ladder;

(3) That the Judge erred in failing to find a violation of section 1910.176(a), notwithstanding General Electric's admissions that it had not complied with the standard;

(4) That the Judge erred by vacating OSHA standard section 1910.27(b)(1)(iii), 17/ rather than finding a violation for which the respondent had been cited and an employee injured;

(5) That the Judge erred by not reclassifying certain citations that should have been classified willful and/or repeated, and that were more serious than claimed by the Secretary; and

(6) That the Judge erred by failing to recommend "other appropriate relief" consistent with the statutory mandate in Section 10(c)

16/ 29 CFR §1910.27 Fixed Ladders.

* * *

(f) Maintenance. All ladders shall be maintained in a safe condition. All ladders shall be inspected regularly, with the intervals between inspection being determined by use and exposure.

17/ See footnote 5, supra.

(29 U.S.C. §659(c)) in view of respondent's numerous, repeated violations of sections 5(a)(1) and (2) (29 U.S.C. §654(a)(1), (2)).

III. Disposition

Resolution of the issues presented by this case will begin with those directed by Commission Chairman Moran; will continue with those directed by Commissioner Van Namee; and conclude with those preserved by the Secretary of Labor and the authorized employee's representative.

The critical issues that are presented by the various contentions are outlined below. For easy reference, the lettered items correspond with the detailed discussion that follows.

A. Height-base ratio of a scaffold - the power of a union to assume the burden of proof concerning a violation when the Secretary of Labor seeks to withdraw.

B. Ladder with inadequate clearance - whether the Judge was empowered to characterize the "other than serious" violation as "serious."

C. Concerning a requirement in a standard that fixed ladder rungs have a minimum clear length of 16 inches - was the Judge empowered to rule in effect that the standard did not meet the statutory definition of the term "occupational safety and health standard" in section 3(8) (29 U.S.C. §652(8)) of the Act because it was "not necessary or appropriate to provide a safe or healthful employment and place of employment."

D. Eye protection - the responsibility of an employer with respect to a "repeated" violation, whether a previously cited violation may be the basis of a "repeated" violation at a different worksite involving the same employer and essentially the same violation.

E. Fall protection for employees - a question of standards interpretation involving exotic working conditions.

F. Pneumatic powered tools - another question of standards interpretation.

G. Housekeeping; combustible waste - a question of the Secretary of Labor's burden of proof.

H. Welding leads; tripping hazard - a matter of reading two standards - a standard designed to prevent tripping hazards resulting from welding cables in light of another standard that requires welding cables to be spread out in order to avoid serious overheating.

I. Stator frames and powered work platforms - there are several issues, perhaps the most important of which is whether a violation of a standard may be based upon potential exposure of employees.

J. Bent fixed ladder - a question of burden of proof.

K. Use of mechanical handling equipment in an area where permanent ailes and passageways were not appropriately marked - a question of standards interpretation.

L. Other issues - miscellaneous issues, including (1) whether the Commission has the power to order an employer to "cease and desist" from a policy of "unilaterally establishing health and safety programs without the advice, consent, and active participation of the Authorized Representative of Employees," and whether the Union may recover from General Electric the costs of this adjudication and reasonable attorney's fees.

A. Improper Height-Base Ratio of Scaffold

Citation for serious violation No. 2 (complaint paragraph VII-b) alleged respondent's violation of section 5(a)(2) (29 U.S.C. §654(a)(2)) for failure to comply with 29 CFR 1910.29(a)(3)(i). As the result of a pre-hearing conference and at the outset of the hearing herein, the Secretary moved to withdraw the alleged violation. The motion was immediately objected to by the Union. Judge Chaplin reserved on the motion and the Union was permitted to present proof on the issue. Subsequent to the Union's presentation, the Secretary moved to withdraw its pending motion to withdraw that part of the complaint alleging respondent's violation of section 1910.29(a)(3)(i), and to substitute a motion to amend the complaint to allege respondent's violation of section 5(a)(1) (29 U.S.C. §654(a)(1)), the so-called "general duty" clause. The Union concurred in the motion. General Electric strongly objected. Again Judge Chaplin reserved and the Secretary was permitted to offer proof on the "recognized hazard" element of a "general duty" clause violation. Finally, in his Reply Brief before Judge Chaplin, the Secretary noted that:

> The respondent presented credible evidence with respect to the Secretary's alleged section 5(a)(1) violation, involving the weldevator scaffold, and the Secretary has apparently not sustained his burden of proof with respect to that alleged violation.

In his decision the Judge granted the Secretary's motion to amend in order to allege a section 5(a)(1) violation, and then vacated the citation. The Union challerged this holding. After a painstaking

review of the evidence, we are convinced that the Judge should be affirmed on this issue.

The testimony of the Secretary's and the Union's witnesses was in direct contradiction to that of General Electric. The hazard alleged was the possibility of the weldevator scaffold tipping over while men were working from it. At maximum elevation (31 feet), there was between 1/2 to 1 inch of sway on the platform. Mr. Gordon Richardson, Vice President of M. D. Knowlton Co., manufacturer of the weldevator in question, testified that the unit met New York State requirements that 50 pounds of force in any direction would not render the weldevator unstable and that engineering calculations for the particular weldevator showed that the point of unstability was approximately 450 pounds of force applied at maximum height. In addition, on the Secretary's second objection, that the height-base ratio violated the widely accepted 4-to-1 rule, Mr. Richardson testified that the weldevator was manufactured with compensating outriggers. The effect of these outriggers was to increase the least-base measurement of the weldevator such that the 4-to-1 rule was not violated. Although the Union offered testimony that there were no outriggers or that available outriggers were not used, the Judge's credibility resolution on that issue is not overruled in light of the clear conflict of testimony. Colonial Stores, Inc. v. F.T.C., 450 F.2d 733 (5th Cir. 1971); N.L.R.B. v. Penzel Constr. Co., 449 F.2d 148 (8th Cir. 1971).

We therefore do not reach the issue framed by the Chairman as to whether the Judge erred in concluding that an employee representative could assume the burden of sustaining a citation if the Secretary elects not to undertake the burden.

B. Ladder Clearance (Section 1910.27(c)(4))

Item 2 of the citation for non-serious violation (complaint paragraph V-b) alleged General Electric's violation of section 5(a)(2) for failure to comply with section 1910.27(c)(4). The uncontroverted evidence adduced at the hearing revealed that a 24-foot, 4-inch fixed-metal ladder had a 2-inch rung clearance at the 17-foot level because a pipe crossed behind the ladder at that point. The pipe prevented the safe positioning of the foot on the rung at the 17-foot level. It is undisputed that a substantial probability of death or serious physical harm exists from the danger of a 17-foot fall. The only issue before us is whether on the facts the Judge acted correctly in characterizing the citation as serious rather than non-serious. 18/

18/ At the outset of its argument before this Commission, General Electric alleges vagueness in section 1910.27(c)(4), which reads as follows:

§1910.27 Fixed ladders.

* * *

(c) Clearance.

* * *

(4) Clearance in back of ladder. The distance from the centerline of rungs, cleats, or steps to the nearest permanent object in back of the ladder shall not be less than 7 inches, except that when unavoidable obstructions are encountered, minimum clearances as shown in figure D-3 shall be provided (emphasis added).

(Con't.)

The record reveals that at the pre-hearing conference, General Electric made a continuing objection to any attempt by the Union to "expand the complaint as phrased to one with an increasing degree of

18/ (Con't.)

Minimum Ladder Clearances

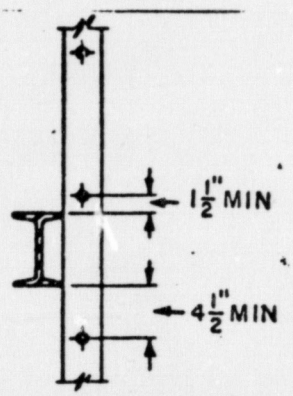


Figure D-3

Clearance for Unavoidable Obstruction
at Rear of Fixed Ladder

Respondent contends that the term "unavoidable obstruction" is not defined anywhere in the standards and "Figure D-3" does not deal with the same topics as does section 1910.27(c)(4). In support of its contention on the question of the vagueness of the phrase "unavoidable obstruction," General Electric relies on the Commission's 2-to-1 decision in Santa Fe Trail Transportation Co., No. 331 (December 18, 1973).

Assuming arguendo any power to review the validity of a standard on the vagueness issue because of the absence of a judicial decision delineating the Commission's powers in this regard, General Electric's position is without merit. The standard establishes two requirements. It requires a minimum of 7 inches of clearance behind the rung. It also establishes minimum clearances for obstructions between rung's (Figure E-3).

The standard furthers the objectives of the Act. When applied to the facts of the case it is clear and unambiguous. The application of the "reasonable man" test requires the conclusion that the standard is not vague. Brennan v. Ryder Truck Lines, 497 F.2d 230, 233 (5th Cir. 1974); Brennan v. Santa Fe Trail Transportation, ___F.2d___ (No. 74-1049) (10th Cir. 1974). Secretary of Labor v. McLean Trucking Co., 503 F.2d 8 (4th Cir. 1974).

severity." Judge Chaplin's actions at the hearing, however, were to allow the full and free introduction of evidence on all issues which the parties deemed relevant to individual alleged violations. Thus, the Secretary's compliance officer testified without objection that he believed that "serious physical harm and possibly death would result" from an accidental misstep at the 17-foot level. On cross-examination General Electric attacked the compliance officer's statement, and tried to discredit it. Judge Chaplin realizing there was a discrepancy between this testimony and the nature of the alleged violation, apparently attempted to clarify the record with the following colloquy:

> Judge Chaplin: If you had to do it now, would that [the nature of alleged violation of section 1910.27 (c)(4)] be a serious or non-serious?
>
> Compliance Officer: I feel it should be, yes.
>
> Judge Chaplin: Shou'd be what?
>
> Compliance Officer: Serious violation.

As the result of this colloquy the Union in its post-hearing brief contended that:

> . . . [I]n view of the record evidence in this case, that this classification [of section 1910.27(c)(4) as non-serious] clearly was an inadvertent error; that in fact the violation should have been classified as 'serious' . . . (emphasis added).

Judge Chaplin sustained the position of the Union that the evidence established a serious violation. He thereafter "amended the pleadings to so charge and find."

The Chairman's direction for review asked whether the Judge's duty to conduct a "fair and impartial hearing" was compromised by this ruling.

The Judge's duty to conduct a "fair and impartial hearing" (29 CFR §2200.22) was not "compromised" by his action. His action was well within the bounds of fairness. Cf. N.L.R.B. v. Phelps, 136 F.2d 562 (5th Cir. 1943). In response to a motion by the union, a party, the Judge simply amended the pleadings to conform to the evidence.

In his decision Judge Chaplin notes that he:

> . . . agree[s] with the position of the Union that the evidence clearly establishes that this [violation of section 1910.27(c)(4)] is a serious violation . . . (emphasis added).

Moreover, the fact that General Electric objected to any attempt by the Union to "expand the complaint" is not controlling. Rule 15(b), Federal Rules of Civil Procedure, provides specifically for this contingency:

> . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits (emphasis added).

As noted above, General Electric was granted a full opportunity to cross-examine the Secretary's compliance officer on the issue of the gravity of injury resulting from a possible 17-foot fall. In addition, although respondent objected to the introduction of "complaint expanding" evidence, its basis for objection was not voiced. It may be concluded that General Electric failed to satisfy the Administrative Law Judge that the admission of such evidence would prejudice its defense. Cf. Brisk Waterproofing Co., Inc., No. 1046 (July 27, 1973).

Also, any hearing resulting from an employer filing of a notice of contest must follow the formal adjudication requirements of the Administrative Procedure Act. Section 554(b) of Title 5, United States Code, requires that the parties entitled to notice of the hearing are to be informed of those matters of fact and law asserted by the charging party. When the underlying facts are alleged in the complaint the agency may find that the conduct violates a different provision of law from that specified in the complaint. This principle is subject to the qualification that any shift in legal theory must not prejudice the party charged with the violation. N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 861-2 (2d Cir. 1966); N.L.R.B. v. Pecheur Lozenge Co., 209 F.2d 393, 402 (2d Cir. 1953), cert denied, 347 U.S. 953 (1954).

The underlying facts of the instant alleged violation were charged in complaint paragraph V-b as follows:

> b) Respondent corporation violated the standards at 29 CFR 1910.27(c)(4) in that the distance from the centerline of a two inch rung of a fixed metal

ladder was less than 7 inches. This lack of clearance existed at the 17 foot level of the ladder which was located in building No. 52, Bay A-32.

The facts underlying the violation were fully set out in the complaint. This agency may find the employer conduct violative of section 17(k) (29 U.S.C. §666(j)), so long as the shift in legal theory did not prejudice respondent.

As set out above, respondent had the opportunity to cross-examine complainant's witness on the main issue which distinguishes a serious from a non-serious violation for which identical penalties are proposed and assessed; i.e., the gravity of possible injury resulting from the violation. In addition, it is clear that respondent could not put on additional proof to refute the gravity of injury resulting from a 17-foot fall. Further, if there were any lack of knowledge of the condition relevant in a defense to a serious violation, any possible prejudice seems most unlikely because of the contest of the proposed penalty and the fact that any evidence of "good faith," which could include any lack of knowledge, was admissible. 19/ Therefore, the decision of Judge Chaplin on this issue is affirmed. 20/

C. Fixed ladder with 12" rungs (section 1910.27(b)(1)(iii))

Section 1910.27(b)(1)(iii) 21/ requires rungs of fixed ladders to have a minimum clear length of 16 inches. The uncontroverted evidence

19/ In the case of a "serious" violation, it is Commissioner Cleary's view that it is incumbent upon the employer to prove any lack of knowledge rather than upon the Secretary of Labor to prove knowledge of the violation. In so doing, he relies upon the fact that the "knowledge" provision is contained in the "unless" clause in section 17(h). This procedural point distinguishes a "serious" violation from a "willful" violation under section 17(a). Frank Irey, Jr., Inc. v. O.S.H.R.C. & Brennan, No. 73-1765 (3d Cir. November 4, 1974).

20/ In its brief to the Commission, General Electric discusses at some length the cases of Wetmore & Parman, Inc., No. 221 (January 22, 1973) and Dundas Pallet Co., No. 266 (February 14, 1973). We have reviewed respondent's contentions based on those cases and find them without merit. They are distinguishable on their facts. Amending pleadings upon motion of a party is clearly not engaging in any prosecutorial role.

21/ The text of which is set out supra, note 5.

of the alleged violation was that the ladder rungs cited had a clear length of only 12 inches. Further, an employee testified that he had slipped in oil-soaked shoes from the ladder rung, and sustained injury that might have been prevented if the ladder had been of proper width. It was his opinion that the extra 4 inches "would have made a difference."

In his decision, Judge Chaplin reviewed the state of ladder requirements noting that various length ladders, fixed or otherwise, were required to have minimum rung clearances of different widths. He then concluded that:

> No logical explanation was advanced for nor am I aware of the reason for the difference between portable and fixed metal ladders. The testimony regarding an employee fall and the safety that an additional 4 inches of rung might have afforded is not credible. The only requirement that makes safety sense is that there be room for both feet. If 12 inches is safe on portable ladders it is just as safe on a fixed ladder. Accordingly I hold that compliance with 29 CFR 1910.27(b)(1)(iii) is not necessary or appropriate to provide a safe or healthful employment and place of employment as required of standards by section 3(8) of the Act. 22/

This was error. The undisputed facts reveal that the ladder did not comply with the standard. Moreover, complainant offered proof of injury the nature of which was designed to be protected against by

---

22/ Judge Chaplin noted that the Secretary had proposed revision of the walking and working surface standards including the instant standard. The proposed standard would require all fixed ladders to have minimum rung clearance of 12 inches. 38 F.R. 24314 (September 6, 1973). The proposed revision has not been acted upon and section 1910.27(b)(1)(iii) remains in full force and effect.

the standard. In the absence of any rebuttal evidence, we find that the Secretary has sustained his burden of proof. Florida Peach Growers Ass'n. v. Department of Labor, 489 F.2d 1120, 1124 (5th Cir. 1974). Brennan v. O.S.H.R.C. & Underhill Constr. Corp., No. 74-1568 & 74-1579 (2d Cir., March 10, 1975).

The Judge has questioned the wisdom of the standard. He has no power to do this. Nothing in the Act gives the Commission such power. The Budd Co., Nos. 199 & 215 (March 8, 1974), petition for review docketed, No. 74-1781 (3d Cir., April 10, 1974), and judicial authority cited therein. Cf. United States Steel, Nos. 2975 & 4349 (November 14, 1974) (Cleary, Commissioner, concurring). His decision on this issue is reversed.

D. Eye Protection; Repeat Violations

Section 1910.133(a)(1) 23/ requires employers to make eye protection "conveniently available" where there is "reasonable probability" of eye injury. It clearly directs employers to require that employees use such protection, because under its express terms no person is knowingly to be subjected to a hazardous eye condition. General Electric was cited for a repeated serious violation of section 1910.133(a)(1) because at the time of inspection two employees were observed breaking-up concrete with a pneumatic hammer without proper eye protection. 24/ It is undisputed that in December 1971 General Electric was cited for a violation of section 1910.133(a)(1) and that citation has become a final order by

23/ The text of which is set out supra, note 6.

24/ The Secretary has clearly established a violation of section 1910.133(a)(1). His witnesses' uncontroverted testimony revealed that the two employees were breaking up concrete without the benefit of proper eye protection. They further testified that the hazard created by this activity could have been avoided by compliance with the standard. Moreover, the employees were working out in the open and with the exercise of reasonable diligence respondent could have known that they were not using proper eye protection.

operation of law. In addition, Judge Chaplin compared the December 1971 violation with the instant violation and found them "almost identical."

General Electric argues that it has done all that may be reasonably expected of a company of its size and diversity to insure the wearing of appropriate eye protection. Citing, Hansen Brothers Logging Co., No. 141 (October 13, 1972); Murphy Pacific Marine Salvage Co., No. 2082 (June 27, 1973) and Standard Glass Co., No. 259 (June 26, 1972) in support of its position, General Electric contends that to conclude that section 1910.133 (a)(1) had been repeatedly violated herein would be to render the employer "an absolute guarantor" of its "employees" compliance.

We disagree. Final responsibility for compliance rests with the employer. 25/ The cases relied upon by General Electric deal with violations that are isolated instances and not generally foreseeable. That is not the case here. The violations were preventable. The record supports the conclusion that, although General Electric is making an effort to promote the use of protective eye equipment, its efforts have not gone far enough. In fact, both employees and employer representatives testified that the failure to use protective eye equipment continues, albeit in rare instances, throughout Buildings 52 and 273. The decision of Judge Chaplin finding the repeated violation of section 1910.133(a)(1) is affirmed.

This overrules the Commission's divided decision in Cam Industries, No. 258 (March 4, 1974) concerning section 1910.133(a)(1). Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision when adherence involves collision with an approach that is intrinsically sounder and verified by experience. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

25/ S. Rep. No. 91-1282, 91st Cong., 2d Sess. 11 (1970).

General Electric has been cited for one repeated serious violation 26/ and three repeated non-serious violations. Of these, the violations of section 1910.157(a)(2) 27/ and section 1910.252(e)(2)(iii) were alleged to have been repeated on the basis of similar citations in other buildings within the Schenectady complex.

The issue is thus presented as to the extent to which a violation that is previously cited, albeit at a different worksite, may become the basis for a later citation for the same violation. The Union contends that General Electric is a single national entity, and therefore any citation issued to it throughout the nation may be the basis for a repeated violation. The Secretary suggests geographical location in Schenectady is the proper locus on which to base repeated violations. General Electric would have its separate divisions within the Schenectady facility considered the proper locus. Judge Chaplin adopted the Secretary's "practical" approach to the question, and concluded that like activities in one geographical location are to be considered.

As a starting point, it should be observed that the size of a penalty that can be imposed for a "repeated" violation is ten times

---

26/ Section 1910.133(a)(1) discussed supra, pages 22-23.

27/ Section 1910.22(a)(1) the text of which is set out supra, note 13. Section 1910.157(a)(2) the text of which is set out supra, note 7. Section 1910.252(e)(2)(iii) the text of which is set out supra, note 8. The previous violation of section 1910.157(a)(3) was noted in a citation dated March 12, 1973. Respondent's Building No. 61 at the One River Road facility had been inspected at that time.

The previous violation of section 1910.252(e)(2)(iii) (Incorrectly cited as section 1910.252(e)(j)(iii)) was noted in a citation dated October 2, 1972. Respondent's Building No. 302 at the Nott Street facility had been inspected at that time.

that for a singular "serious" violation. Hence, it is obvious that Congress intended to deal with a more flagrant type of conduct than just a single serious violation. Cf. Frank Irey, Jr., Inc. v. O.S.H.R.C. & Brennan, No. 73-1765 (3d Cir., November 4, 1974), petition for rehearing granted (December 20, 1974), which discusses "willful" violations of the Act. These are grouped with "repeated" violations as being the most severe in the hierarchy of civil penalties. The term "repeated" is therefore read to mean happening more than once in a manner which flaunts the requirements of the Act. With a test of whether the requirements of the Act are being flaunted it cannot be said abstractly just how many places of employment or conditions of employment should be considered. Each case must be decided upon its own merits and turn upon the nature and extent of the violations involved. In the case before us we are satisfied that the approach urged by the Secretary and adopted by the Judge for this employer in the Schenectady area is realistic.

The approach urged by the Union is categorical, and it may be unrealistic as to problems that are parochial rather than national in scope. The assertions of General Electric go to the opposite extreme, and would in effect require that the enforcement of the Act be tailored to suit General Electric's corporate structure. This is hardly consistent with the text of the Act or the Congressional purposes. Our experience teaches us that the Secretary's inspectors are generally experts in job safety or health, and know little about

corporate structures. Requiring them to examine internal corporate organization before characterizing violations is hardly consistent with their effective enforcement of the Act.

Respondent's "divisional accountability" argument is not persuasive. Moreover, it asks this Commission to overlook certain economic "facts of corporate life" that refute its position. There are apparent benefits to be derived from maintaining one large facility rather than numerous smaller ones. Indeed, the record reveals that one corporate official testifying on behalf of respondent considered both the One River Road and Nott Street facilities to be the "main plant." In addition, the Schenectady Utility Operations Division has overall responsibility for a wide range of activities pursued at all of respondent's facilities. It is "the landlord of the plant." There exists a limited amount of employee exchange among the various buildings at the plant. Finally, one Union official has overall safety responsibility at Schenectady. He testified that he had long operated with the understanding that the company had one man as its safety director. This testimony was not refuted.

The General Electric facility at Schenectady for our purposes may be said to include the One River Road; Nott Street "main plant" and the additional support facilities in Saratoga County, West Milton and Castle

Ring. The decision of Judge Chaplin affirming the citation for repeat non-serious violations is affirmed.

E. Fall Protection for Welders

Section 1910.252(e)(1)(i) 28/ requires welders and their helpers to be protected against falling while working on platforms, scaffolds, or runways. Protection in this instance may take the form of railings, safety belts, life lines or other equally effective safeguards. Complaint paragraph VII(a) alleged General Electric's violation of 29 U.S.C. §654(a)(2) for failure to comply with section 1910.252(e)(1)(i) in that:

> [General Electric] failed to protect against falling two welders working on top of a stator frame 15 feet 3 inches above the surrounding surface in Bay A-2 of building No. 52 by railings, safety belts, life lines or other equally effective safeguards.

Judge Chaplin after hearing evidence on this issue made the following finding of fact:

> 4. Stator frames are large component parts of turbine generators that move through the plant on a wheeled frame with the capacity to be rotated to permit work to take place on all sides. The cited stator frame was in a horizonal position and in this position it was 15 feet 3 inches above the floor (Tr. 1-46). Two employees were welding on top of the frame (Tr. 1-46) and they were not wearing any safety device and there was no other

28/ The text of which is set out supra, note 10.

> protective device around the workplace (Tr. 1-48). Abatement was directed to be accomplished immediately and the workmen now wear safety belts tied off.

Judge Chaplin refused to affirm the alleged violation, however, noting that the "only issue to be resolved . . . is whether the area on top of the stator frame may be considered a platform or scaffold within the meaning of the standard." 29/ He found the standard not to be applicable to the alleged violation and dismissed the citation.

A "platform" is defined at 29 CFR 1910.21(a)(4) as a working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment. The definition applies as a matter of plain meaning.

In any event, the purpose of the Act is to protect the health and safety of workers. This purpose is not well served by reading a standard in a manner that detracts therefrom. Here, this purpose is best served by a broad construction of the word "platform" in the standard. Cf. Secretary of Labor v. American Smelting & Refining Co., 501 F.2d 504 (1974). The Court in Secretary of Labor v. Ryder Truck Lines, 497 F.2d 230, 233 (1974), noted that it:

> . . . must consider the statute "not only in terms of the statute 'on its face' but also in light of the conduct to which it is applied." United States v. National Dairy Corp., 372 U.S. 29, 36, 83 S.Ct. 594, 600, 9 L.Ed. 2d 561 (1963). The regulation [29 CFR 1910.132(a)] appears to have been drafted with as much exactitude as possible in light of the myriad

---

29/ Amending the complaint to allege a section 5(a)(1) (29 U.S.C. §654(a)(1)) - general duty clause - violation was dismissed by the Judge as being, under these facts, prejudicial to General Electric.

> conceivable situations which could arise and which would be capable of causing injury. Moreover, we think inherent in that standard is an external and objective test, namely, whether or not a reasonable person would recognize a hazard of foot injuries to dockmen, in a somewhat confined space, from falling freight and the rapid movement of heavy mechanical and motorized equipment, which would warrant protective footwear. So long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster. United States v. Petrillo, 332 U.S. 1, 4, 67 S.Ct. 1538, 91 L.Ed 1877 (1947).

In the instant case the regulation appears "to have been drafted with as much exactitude as possible . . . . " Moreover, inherent in 1910.252(e)(1)(i) is the same external and objective test alluded to in Ryder Truck Lines: Would a reasonable person recognize a hazard to a welder wearing neither a safety belt nor protected by a lifeline, of falling from a height exceeding 15 feet from a stator frame which is not guarded by railings or other equally effective safeguards? We think so.

The hazard is clear and is one which compliance with section 1910.252(e)(1)(i) contemplates. In light of the above we conclude that Judge Chaplin erred when he dismissed complainant's citation for this alleged violation. We, therefore, reverse the decision of the Judge on this issue and affirm the citation.

F. Pneumatic Powered Tools - Tool Container

Section 1910.243(b)(1) 30/ requires a tool retainer on all pneumatic-powered equipment in use where, in the absence of such retainer, the possibility exists that the tool may be ejected. Complaint paragraph VII(f) alleged General Electric's violation of section 5(a)(2) for failure to comply with section 1910.243(b)(1) in that:

> Respondent violated 29 CFR 1910.243(b)(1)(ii) in that it failed to provide a tool retainer on a portable hand held pneumatic chisel that was able to eject the tool.

Judge Chaplin concluded that "there is no argument that respondent was in violation of the standard requiring retainers on pneumatic powered hand tools." He continued, however, and noted "credible" and "persuasive" testimony which revealed "that under [ordinary] working conditions tools [chisels] would rarely eject from their holder and even if it happened the tool would only 'dribble' out . . . ." He concluded that "at most this is a de minimus (sic) violation."

Judge Chaplin has correctly characterized the evidence on this issue. It is clear that the instant pneumatic-powered hand-held chisel was not guarded. It is also clear that there existed the possibility that this chisel could be ejected and in a "test," a chisel was actually "shot" a distance of eight feet. This "test," however, did not reflect the characteristic use of the chisel. The chisel is used for chipping excess metal from an object being manufactured in the Schenectady

30/ The text of which is set out supra, note 11.

plant. It is not positioned against a hard surface and "fired," as was the case in the test. The decision of the Judge is, therefore, affirmed.

In affirming the Judge, we note that section 9(a) (29 U.S.C. §658(a)) authorizes the Secretary to issue a notice in lieu of a citation with respect to de mirimis violations having no direct or immediate relationship to safety and health. The Act is facially silent, however, as to the authority of the Commission to find a de minimis violation where there is a direct relationship to safety and health, but that relationship is so remote as to be nearly negligible as is the case herein. We conclude that section 10(c) (29 U.S.C. §659(c)) granting the Commission, after a hearing, the authority to "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . ." (emphasis added), provides the requisite authority. Of course, when a violation may not be fairly characterized as de minimis, there may well be recourse to the Secretary of Labor's variance procedures. See 29 CFR Part 1905.

G. Housekeeping; Combustible Waste

Section 1910.106(e)(9)(iii) 31/ requires combustible waste and residue in a work area to be kept to a minimum; stored in covered metal receptacles; and disposed of daily. Complaint paragraph V(d) alleged that:

31/ The text of which is set out supra, note 12.

> Respondent . . . violated the standard [as amended] . . . in that [an] approved container was not used for combustible liquid. Specifically, in building No. 52, Bay A-18, an open 55 gallon drum was observed to be partially filled with combustible paint thinner.

Complainant's evidence sought to establish that the liquid in the container was "Rust-ban," a combustible material which was to be kept away from heat and open flame. General Electric, however, offered proof to establish that the liquid was ordinary water, the by-product of a nearby "shot-blast" operation.

The Judge found that the Secretary failed to meet his burden of proof with respect to the standard because the liquid in the drum was not tested to see if it was combustible. The record reveals that the Judge's decision is consonant with the weight of evidence. We do not adopt his dicta on this point of testing.

H. Welding Leads; Tripping Hazard

Section 1910.22(a)(1) requires "all places of employment, passageways, storerooms and service rooms [to] be kept clean and orderly and in sanitary condition." Complaint paragraph IX(a) alleged that:

> Respondent . . . violated 29 CFR 1910.22 (a)(1) [in that] Bay A-7, Building No. 52 was not kept in a clean and orderly fashion. Specifically welding leads and compressed air hoses, in use were scattered about the

floor in the work area of the employees so as to be a tripping hazard. 32/

It is clear from the evidence that what is alleged and tried here is simply a tripping hazard created by scattered welding leads.

Judge Chaplin cogently observed that two specific standards seem relevant to this situation. They are the following:

§1910.252 Welding, cutting, and brazing.

* * *

(b) Application, installation, and operation of arc welding and cutting equipment.

* * *

(4) Operation and maintenance.

* * *

(ii) Machine hook up. Before starting operations all connections to the machine shall be checked to make certain they are properly made. The work lead shall be firmly attached to the work: magnetic work clamps shall be freed from adherent metal particles of spatter on contact surfaces. Coiled welding cable shall be spread out before use to avoid serious overheating and damage to insulation (emphasis added).

* * *

(e) Protection of personnel.

(1) General.

* * *

32/ The Secretary's exhibits 1 and 2 reveal that General Electric had been cited on two previous occasions for violating the same standard. These citations were not contested, and have since become final orders. Thus, there is no question that the alleged violation was properly characterized as "repeated" within the meaning of section 17(a) (29 U.S.C. §666(a)).

(ii) Welding cable. Welders shall place welding cable and other equipment so that it is clear of passageways, ladders, and stairways (emphasis added).

The Judge read the standards as suggesting that the welders must necessarily string out their welding leads impliedly to avoid overheating, and that it is a matter of degree as to whether the dispersion is excessive and may be characterized as a tripping hazard that should be avoided. 33/ The Judge vacated the citation.

Whether or not a tripping hazard is created through the disorderly scattering of welding leads and compressed air hoses is a matter which may and should be judged objectively. Secretary of Labor v. Ryder Truck Lines, supra. 28. The testimony and exhibits which relate to the instant violation clearly establish that many feet of hose, in excess of that which was required, were laying haphazardly on the floor in an area where employees were required to work. Moreover, the hoses were criss-crossed and coiled back upon themselves and other objects on the floor in such a manner as to create several little areas wherein an employee could catch his foot and trip.

The decision of the Judge on this issue was against the weight of evidence. His decision to vacate Secretary's citation for repeat violation on this issue is reversed.

33/ Section 1910.252(e)(1)(ii) also suggests that its specific requirements are controlling rather than the more general requirements of section 1910.22(a)(1). See section 1910.5 for the rule of construction indicating this. However, that a different standard was cited is not considered prejudicial. As indicated above, the essential issue was the tripping hazard, a factual issue, and this was plainly tried.

I. Stator Frames and Powered Work Platforms

Section 1910.23(c)(1) 34/ requires open-sided floors, platforms and runways 4 feet above the adjacent floor to be guarded by a standard rail or its equivalent. Complaint paragraph XIII alleged that:

> . . . respondent . . . violated 29 CFR 1910.23(c)(1) in that it did not provide a standard railirg or the equivalent as specified in 29 CFR 1910.23(c)(3) on open sided platforms or floor 4 feet or more above adjacent floors or ground level. Specifically, unguarded was a 14 foot high horizontal stator frame, building No. 273, Bay H-17; two work platforms six feet ten inches above the surrounding surface in building No. 273 in Bay K-8, and a powered work platform No. 15836 in building No. 273, Bay K-11 that could be elevated to a height of ten feet. 35/

At the time of the hearing, General Electric and the Union were at odds over a still unresolved grievance filed by a steward in the large generator division over the precise issue of guarding, with a standard railing or its equivalent, stator frames.

Judge Chaplin concluded that the only issue was, were the objects "platforms" within the meaning of the standard. He held that

---

34/ The text of which is set out supra, note 14.

35/ Judge Chaplin agreed with the Secretary that the allegedly violative conduct was willful in that it was "intentional, knowing or voluntary as distinguished from accidental." Indeed, the record clearly supports the willful allegation. Respondent had been previously cited for violation of the same standard. The violation had not been contested and was the final order of this Commission by operation of law. We agree with the Judge's conclusion as it applies to the powered work platform. We find a genuine conflict among the parties as to whether the standard applies to stator frames. See p. 36; cf. Secretary of Labor v. Frank Irey, Jr., Inc., No. 73-1765 (3rd Cir. November 4, 1974).

neither the stator frame nor the work platforms were "platforms." He held further that, although the powered work platform was within the standard, the alleged violation must still be vacated because complainant failed to prove employee exposure within six months of the alleged violation. Thereafter, he vacated the citation in its entirety.

The action of the Judge with respect to the stator frame and powered work platform was in error. We have already discussed the applicability of section 1910.252(e)(1)(i) to stator frames, and conclude that they are platforms for purposes of standards regulating work-surfaces.35a/ Section 1910.252(e)(1)(i), however, is limited in applicability to welders. Complainant's exhibit 13, a photograph, clearly depicts a General Electric employee operating a drill press on an otherwise unguarded stator frame. On these facts, section 1910.23(c)(1) is the applicable standard and a violation is established. The record does not support a willful allegation of violation of section 1910.23(c)(1) in this instance, however, because General Electric disputed the applicability of this standard in good faith. As such, the nature of this violation must be reduced from willful to serious.

35a/ This holding is consistent with the definition of the term "platform" in section 1910.21(a)(4).

Testimony regarding the powered work platform revealed that the platform could be raised to a height of ten feet. The platform lacked any type of railing.

The only issue was that of "employee exposure" during the period prescribed by section 9(c) (29 U.S.C. §658(c)). Respondent attempted to establish that the platform was not to be used without guardrails. However, this testimony was directly refuted by the following testimony of the Union's safety director, who observed the platform in use at heights of six and eight feet:

> Q. On the occasions where you saw the employees working on it, was it provided with the standard guardrails?
>
> A. No. What it was, the employees had up there at the time that I saw it, and they had welded a piece of angle iron across to the shell that they were working on, and from the platform to the shell, to provide themselves with a temporary guard.
>
> Q. Was there a standard guardrail around all open sides of this platform?
>
> A. No. . . . (emphasis added).

The platform was "regularly in use," being used at least once a month.

Plainly whether "employee exposure" is an issue and if so, what type of exposure must be shown are questions that need not be resolved here because the evidence clearly demonstrates that there was exposure to the risk of falling because of the absence of any fall protection. In this regard, the case is similar to Chicago Bridge & Iron Co., No. 224 (December 26, 1974). Men were often required to work in the area of the powered platform at heights which would require use of a platform of some type. The decision of Judge Chaplin as it relates to vacation of the citation for willful violation of section 1910.23(c)(1) - failure to properly guard a

powered work platform - is reversed and that part of the citation is hereby affirmed.

We add that our reluctance to face the "exposure" issue here is reinforced by the fact that the Second Circuit and the Fourth Circuit have expressed differing views on the "exposure" issue in Gilles & Cotting & O.S.H.R.C., 504 F.2d 1255 (4th Cir. 1974) and Brennan v. O.S.H.R.C. & Underhill Constr. Corp., Nos. 74-1568 & 74-1579 (2d Cir., March 10, 1975). Gilles & Cotting is before us on remand, and the briefing period has not expired as of this writing.

J. Bent Fixed Ladder

Section 1910.27(f) 36/ requires all fixed ladders to be maintained in a safe condition. Complaint paragraph V(c) alleged that:

> Respondent . . . violated the standards at 29 CFR 1910.27(f) in that . . . [it] failed to maintain a fixed metal ladder in a safe condition. Specifically the side rails of the fixed metal ladder were bent to the left near the bottom so as to affect the safety and stability of the ladder. This condition existed in building No. 52, Bay B-24.

In his decision Judge Chaplin concluded that:

> Item No. 3 of this citation pertained to the stability of a bent ladder. The applicable standard requires ladders to be maintained in a safe condition. Safe meant different things to different people. To one CO it meant stable, to another it meant solid rungs and to the Union Safety Director it meant no fear of falling from missing a rung. The testimony was that the ladder seemed stable to grip, the rungs appeared to be solid. The evidence presented, including the picture of the ladder in question, does not support a determination that this is an unsafe ladder. The Secretary has failed to sustain his burden of proof.

36/ The text of which is set out supra, note 16.

The Judge's conclusior is in error. The standard does require ladders to be "maintained in a safe condition." A photograph, Secretary's exhibit-15, of the instant ladder revealed that the bottom two rungs were bent out of the vertical plane of the ladder. An employee climbing down such a ladder, relying on the ladder to be straight, could easily misstep and fall a distance of some three feet. Clearly, such a fall could result in injury to the employee. A non-serious violation has been established. The decision of the Judge on th s issue is reversed.

K. Use of Mechanical Handling Equipment; Aisles and Passageways

General Electric was cited for using mechanical handling equipment in an area where permanent aisles and passageways were not appropriately marked and kept clear.

The pertinent standard reads as follows:

1910.176 - Handling materials - general.

> (a) Use of mechanical equipment. Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

Testimony concerning this alleged violation revealed that one half of Bay C of Building 52 was used as a furnace room. In the remaining half of the bay numerous palletized boxes and bags of material were randomly

sitting where they were dropped. The compliance officer did not see any actual mechanical handling equipment in use at the time of inspection, but drew a reasonable inference as to their use as the result of the stored pallets of material. 37/ There were no aisles or passageways that were marked as such. This could impede egress in case of fire. Also, General Electric's employees were exposed to the resulting hazard because they had to pass through this area to tend the boilers. In addition, a hoist operator worked in that bay.

On cross-examination the issue of the amount of stored material was explored. Judge Chaplin interposed the following question:

> The Court: . . . Was that half of the room more full than it was empty?
>
> Compliance Officer: Yes.

Finally, a General Electric's witness admitted that at the time of inspection there were no aisle markings.

Judge Chaplin vacated the citation noting that the "crux of the issue," whether there was any need for permanent aisles in the storage room had not been resolved. In addition, he characterized the area as "a temporary storage situation, being utilized during alterations." Judge Chaplin's decision on this issue was in error.

37/ Later, during cross-examination, General Electric's superintendent, Weldments, Sub-section, Large Turbine Steam Department, Building 52, admitted that powered vehicles such as fork-lift trucks were used in Bay C.

The record clearly indicates that a storage area was entered by mechanical handling equipment, and it was, at the time of inspection, devoid of aisle and passageway markings. 38/ The compliance officer neatly summed up the dilemma with his response to the following two questions asked during cross-examination.

> Q. You say, Mr. Nead, that the aisles weren't marked? What aisles? What aisles are we talking about, sir?
>
> A. That is what the problem is. There weren't any aisles in there. In any place of business where people work, or merchandise is stored, they must have a permanent aisleway which is to say that a minimum in the event of people just walking, 28 inches, and to give them access to get out of the building, and in the event of mechanical piece of equipment, and it must be as wide as the vehicle.
>
> Q. In a building, including the storage areas, must be aisles designated; is that your point?
>
> A. That is correct. They must be designated.

Moreover, Judge Chaplin's characterization of the area as a temporary storage facility is not supported on the record. The Judge's characterization misses the point of the specified violation and the standard. There may be "permanent" aisles and passageways through even temporary storage facilities. In the sense of the standard, "permanent" obviously does not mean forever. It must be construed in light of the objective of the standard - here provision for marked ways of egress

---

38/ We note, however, that aisles and passageways in this area have, since the citation, been marked.

in case of emergency. It suggests any duration other than transitory. The decision of the Judge vacating complainant's citation on this issue is reversed.

L. Other Issues

The Union has alleged error in Judge Chaplin's failure to reclassify certain citations as "willful" or "repeated" or as otherwise more serious than alleged by the Secretary. Citations for "willful" or "repeated" violations warrant the assessment of the most severe civil penalty that the Act provides. There would be clear prejudice to an employer if he had no notice thereof during the proceeding. Cf. N.L.R.B. v. United Aircraft Corp., Hamilton Standard Div., 34 Ad.L. 121 (2d Cir. 1973). We therefore are constrained to reject the contentions of the Union.

With respect to raising non-serious violations to serious violations, we have affirmed the action of the Judge when he did so on the basis of the evidence pursuant to the motion of the Union and in the absence of prejudice to respondent. With respect to the remaining non-serious violations in this proceeding, review of the facts of each violation compels us to conclude that they were properly characterized by the Secretary.

The Union argues that it should share the enforcement role of the Secretary of Labor by bringing violations of the Secretary's standards to the attention of General Electric and that failure to act on the "alleged violations" would thereafter form the basis for the issuance of a citation for "repeated" violation by the Secretary.

Certainly, informing an employer of any failure to follow a standard is to be encouraged. But a notice to the employer that he is "in violation" of the Act from the employee(s) is not provided for in the Act.

The Union has urged that the decision in this case be "comprehensive." It seeks not only specific findings of fact and conclusions of law regarding the instant violations, but also asks that "due consideration be given to the responsibilities of the [Commission] contained in section 10(c) (29 U.S.C. §659(c)) of the Act." Section 10(c) requires this Commission to:

> . . . [I]ssue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, . . . (emphasis added).

"Other appropriate relief" in this instance would include the issuance of an order directing General Electric to "cease and desist" from its policy of "unilaterally establishing health and safety programs without the advice, consent, and active participation of the Authorized Representative of Employees."

The key to the consultation issue is that the position of the Union not be undercut vis-a-vis its relationship with management on safety matters. In this regard, a decision to require consultation on matters of employee safety, which is limited to those covered in affirmed citations, is permissible under the Act, and will not detract

from the scheme of the National Labor Relations Act and section 8(a)(5) in particular. Moreover, section 2(b)(2) (29 U.S.C. §651(b)(2)) states as one Congressional purpose of our Act that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions. Finally the Senate Report notes that:

> It has been made clear to the committee that the most successful plant safety programs are those which emphasize employee participation in their formulation and administration; every effort should therefore be made to maximize such participation throughout industry. 39/

Accordingly, we adopt the suggestion of the Union and under authority granted to this Commission to direct "other appropriate relief" we hereby require General Electric to consult with its authorized employee representative on matters affecting employee health and safety, but in the interest of practicality we limit our order to consultation on matters found in violation in this proceeding. Indeed, such an order may well be considered incidental to the abatement that is otherwise required. We add that the Commission encourages employers to consult with affected employees and their representatives on matters of safety and health.

39/ S. Rep. No. 91-1282, 91st Cong., 2nd Sess. 10 (1970).

In appropriate cases such consultation will be considered in determining the good faith factor in the penalty computation.

The Union asks that General Electric be ordered to take affirmative action to correct like standards violations in all of its facilities nationwide. It asks that it be awarded costs. Finally, this Commission is asked to retain jurisdiction of this case by directing Judge Chaplin to be available to entertain any ad hoc applications for supplemental and summary relief.

Respondent's employees have the right to request an OSHA inspection when they believe that a violation of a safety or health standard exists that threatens physical harm or imminent danger. See section 8(f) (29 U.S.C. §657(f)). In addition, this right is safeguarded by the further provision that upon receipt of an employee's request the Secretary must act upon it or notify the employee in writing of the reasons for his belief that there are no reasonable grounds

to believe that a violation or danger exists. Moreover, as is the case herein, when a respondent has a history of violations of the Act which are now final orders of this Commission, the penalty provisions of the Act will provide additional inducement for the employer to remain in compliance with section 9(a) (29 U.S.C. §654(a)). For these and the reasons set forth in Part D of this decision the holdings herein will be limited to the Schenectady facility.

As a general rule, attorney's fees are not recoverable in the absence of statute or an enforceable contract providing therefor. Fleischmann Distill. Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). Also, there are no fees or charges required by the Commission in its proceedings.

The statutory scheme under which this Commission functions does not contemplate, at least generally, the retention of jurisdiction while at the same time ordering compliance and payment of assessed penalties. The Secretary of Labor has the duties of enforcing compliance and initiating penalty collection.

M. Penalties

Section 17(a) (29 U.S.C. §666(a)) provides that any employer who willfully or repeatedly violates the requirements of section 5 (a) (29 U.S.C. §654(a)) may be assessed a civil penalty of not more than $10,000 for each violation. Section 17(b) and (c) (29 U.S.C. §666(b) and (c)) provide that any employer who seriously violates the requirements of section 5(a) (29 U.S.C. §654(a)) shall be assessed a civil penalty of up to $1,000 for each non-serious violation. Section 17(j) (29 U.S.C. §666(i)) requires the Commission to assess all civil penalties giving due

consideration to its appropriateness with respect to the size of the business of the employer, the gravity of the violation, the employer's good faith, and history of previous violations.

General Electric is an extremely large corporation, employing more than 27,000 people at its Schenectady facility. It has a history of both non-serious and serious violations which are final orders of this Commission spanning a fifteen-month period prior to the March 1973 inspection.

The "good faith" of General Electric has been put into issue by the Union. The transcript reveals that its contentions are well taken. The Secretary established a substantial number of repeated safety violations. The Union presented its safety director who testified at length concerning company-union safety relations. He established there was no direct contact between management responsible for safety and the Union safety director. All such contact was instead channeled through Union relations personnel. Although all of the above was established, respondent did not call as rebuttal witnesses the two officials responsible for worker safety and health in Schenectady. The evidence further reveals that General Electric was aware of on-going violations, and applied little or no additional effort to see that they were eliminated.

General Electric has been found in non-serious violation of the following standards in Part 1910: (1) .252(b)(4)(ix)(c); (2) .27(f);

(3) .176(a); and (4) .27(b)(1)(iii). The gravity of each of these violations was low. The chance of injury resulting from their violation was slight. The Secretary has recommended no penalty for any of them. We agree.

Respondent has been found in serious violation of section 1910.252(e)(1)(i) for failing to provide fall protection to welders working on stator frames. The gravity of this violation is high. A fall from a height of fifteen feet would clearly result in serious injury. Moreover, because the frames are nearly cylindrical in shape and covered with oil in some places, the probability of a fall is high. In light of this and the consideration of the other statutory factors already discussed, we assess a $900 penalty.

Respondent has been found in serious violation of section 1910.27(c)(4) for failing to maintain proper clearance behind the rung of a fixed metal ladder at the 17 foot level. The gravity of this violation is moderate. There is seven inches of space between the ladder and the fixed pipe that would allow an employee to partially control the placement of the foot on the rung, thereby reducing the chances of a "free" fall. The probability of a fall is low. In light of these and the other statutory factors already discussed the Judge's assessed $100 penalty is affirmed.

No penalty may or should be assessed for General Electric's de minimis violation of section 1910.243(b)(1)(ii).

General Electric has been found in "repeated" non-serious violation of the following standards in Part 1910: (1) .22(a)(1);

(2) .157(a)(2); (3) .252(e)(2)(iii). The Secretary asserts that the very nature of "repeated" violations requires the imposition of some substantial penalty. He further asserts that the action of Judge Chaplin in reducing the amount of the proposed penalties for section 1910.252(e)(2)(iii) - welding screens, and section 1910.133(a)(1) - eye protection (alleged as a repeat serious violation) was subjective and inadequate, in contrast to the method used by the Secretary. We agree. We accept the advice of the Secretary, and affirm his proposed penalties of $500 for repeat non-serious violation of .22(a)(1); $1,000 for repeat non-serious violation of .252(e)(2)(iii); and $2,000 for repeat serious violation of .133(a)(1).

The citation for willful violation of section 1910.23(c)(1) is affirmed as it applied to the powered work platform. The gravity of the powered work platform violation is moderate in that the working height of the platform did not exceed 10 feet. A penalty of $2,000 is assessed. The alleged willful violation of section 1910.23(c)(1) applicable to stator frames has been reduced to a serious violation. The gravity of the stator frame violation is high. It is often partially covered with oil and men are very subject to fall from an oil covered rounded surface. Moreover, its height exceeds 15 feet. A penalty of $900 is assessed.

So ORDERED.

FOR THE COMMISSION

William S. McLaughlin
Executive Secretary

DATED: APR 21 1975

VAN NAMEE, Commissioner, dissenting in part.

I respectfully dissent from my colleagues' decision, and particularly to:

1. Their conclusion that we have the broad authority to issue an order directing an employer to cease and desist from a policy of unilaterally establishing health and safety programs without the advice, consent, and active participation of the authorized representative of employees (slip opinion at p. 43).

2. Their action of increasing the nature of a violation from nonserious to serious upon the Union's late motion so as to effectively make the union a coprosecutor with the Secretary.

3. Their conclusion that a huge industrial complex wherein over 27,000 persons are employed by six diversified corporate divisions each headed by a vice president, general manager and other smaller, separate departmental operations all located in more than 50 buildings at different plant sites within the complex is a single business entity or establishment such that a repeat violation under 29 U.S.C. 666(a) may be predicated solely on the basis that the same standard had been previously violated at some location within the complex.

4. Their finding of a willful-serious violation as to a work platform predicated on evidence that cannot support the finding as a matter of law so as to avoid deciding the issue whether a violation exists if an employee is potentially exposed to a hazard.

5. Their conclusion that a product being manufactured is a platform within the meaning of 29 C.F.R. 1910.21(a)(4), such that

29 C.F.R. 1910.23(c)(1) requires guardrails on the product.

6. Their decision finding that Respondent was in repeated-serious violation of 29 C.F.R. 1910.133(a)(1) for not requiring its employees to use eye protection devices and to their express overruling of our decision in CAM Industries, Inc., 7 OSAHRC 30, BNA 1 OSHC 1564, CCH E.S.H.G. para. 17,373 (1974).

7. Their refusal to defer to the administrative law judge's subjective determinations predicated on the evidence of record regarding the bent ladder, welding leads, and the like.

The Cease and Desist Order[1/]

As to this issue it is important to note first that while my colleagues say we have broad authority to require management to consult (bargain ?) with labor on safety and health issues they issue a limited order directed only to the matters found in violation. I object principally to the statement of broad authority, and I have reservations concerning the limited order.

The majority order involves employees in areas usually reserved to management. Thus this Respondent is required by their decision to consult with the union on the question of erecting railings on stator frames, a product manufactured by Respondent.[2/] The majority in calling the stator frames work platforms implies that they are of planar construction. Slip opinion at p. 28. The exhibits clearly show the frames

---

1/ I note that Commissioner Cleary has recently taken the position that we do not have authority to issue a cease and desist order in a case where the question was whether a cease and desist order could issue to employees. Atlantic & Gulf Stevedores, Dkt. No. 2818 (April 11, 1975). There he said a cease and desist order would be contrary to the policy of the Norris-LaGuardia Act.

2/ My colleagues find Respondent in serious violation of 29 C.F.R. 1910.23 (c)(1) and require abatement according to the terms of the standard. See below under the subheading, "The Stator Frames."

to be cylindrical, and at least one employee testified they were round. They are clearly not suitable for guardrails. It therefore appears that the stator frames may have to be redesigned in order to effect compliance with the majority's decision. Under that decision employees will have to be consulted on the redesign. Surely, it is a novel proposition of law to have management consult on design matters. I suppose they will in the future require consultation on capital investments in equipment because of noise problems and the like.

Moreover, the majority position is counter productive because consultation will necessarily prolong abatement. And conceivably an abatement period will expire during consultation such that an employer may become liable for daily penalties under 29 U.S.C. 659(b) and 666(d).

Finally, and contrary to the majority statement that their order "will not detract from the scheme of the National Labor Relations Act" (slip opinion at pgs. 43, 44),[3/] I find that it may be in direct conflict with the N.L.R.A. and policy established thereunder. Under that Act employers and represented employees have a duty to bargain collectively over the terms and conditions of employment in negotiating contracts or with respect to questions arising under existing contracts, and a failure to bargain by either party is an unfair labor practice, 29 U.S.C. 158(a)(5), (b)(3), and (d), subject to the jurisdiction of the National Labor Relations Board (N.L.R.B.). And if the bargaining agreement includes

---

3/ No authority is given for the statement.

issues which are subject to arbitration, the N.L.R.B. will defer to arbitration. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 LRRM 1931.

In this case, by issuing a cease and desist order, the majority effectively finds that Respondent has failed to bargain, i.e., has committed an unfair labor practice. In so doing, they invade that that is within the exclusive province of the N.L.R.B. Secondly, they invade without even bothering to determine as fact that Respondent has refused to bargain.[4/] Nor have they determined whether the Union before us is the appropriate bargaining agent for each of the safety matters determined by their decision.[5/] And, last but by no means least, the bargaining agreements are not before us so I cannot say whether or not they have done violence to the N.L.R.B.'s policy to defer to arbitration. But certainly I do conclude that their decision "detracts" from the scheme of the N.L.R.A.

The Union As Coprosecutor

The majority states that it does not here decide whether a Union may assume the Secretary's role of prosecutor (slip opinion at p. 15). Immediately after making the statement they amend the Secretary's citation for a non-serious violation of 29 C.F.R. 1910.27(c)(4) (ladder clearance) on what is characterized as the Union's motion to find

---

4/ The record shows that some matters in issue here have been submitted to grievance procedures.

5/ On the record it is possible to infer that the Union in this case is the appropriate bargaining agent. But I also note that out of 64 departments located in Respondent's complex, the Union before us represents employees in only 16.

a serious violation.[6/] Surely, the Union has been allowed to coprosecute when it is permitted to rewrite the citation.

I find no authority for their action, and, of course, they cite none. In this regard I will merely note that all of the Act's provisions relating to employee rights are directed towards the abatement of hazards. A more reasonable interpretative approach than that taken by my colleagues, therefore, would be to conclude that the employees' concern over the severity of a hazard is with the time it should take to abate a hazard rather than to the question of whether the violation is serious or non-serious for penalty purposes.

Aside from the foregoing, a more important reason exists for not increasing the nature of the violation in this case. Respondent was not given notice either prior to or during the hearing that it had to defend against anything other than a non-serious citation. Indeed, neither the Secretary nor the Union moved to amend the citation at any time prior to or during the hearing. The most that can be said is that the Union was concerned about the gravity of the violation. This is not enough to put Respondent on notice that it should be prepared to try issues under 29 U.S.C. 666(i).

On the record, I would conclude that Respondent was in non-serious violation of 29 C.F.R. 1910.27(c)(4).

6/ It should also be noted that my colleagues permit the Union to prosecute the penalty issues in this case (slip opinion at p. 48). They imply that Respondent has acted in bad faith in view of such prosecution. I would not make such a finding particularly because of labor-management relation overtones in this case. See note 3.

The Repeated Violations

My colleagues conclude that a repeat violation is one that occurs more than once "in a manner which flaunts the requirements of the Act" (slip opinion at p. 25). I would agree with this characterization. Inconsistently, however, they go on to conclude that whenever a violation merely recurs in the same general geographical location, the employer is in repeated violation. That is, for the purpose of determining whether an employer has flaunted the Act they will look only to the fact of whether the second violation has occurred in the same general geographical location. They dismiss all factors bearing on the economic realities of the situation.7/

I cannot lightly dismiss the realities of the situation. In my view an employer cannot be said to have flaunted the Act's requirements unless those having authority to require abatement of the original violation are

---

7/ My colleagues do not even so much as discuss the economic factors involved. It is enough for them that the Secretary's compliance officers are unlearned regarding corporate structures and that Respondent requires a landlord to provide utility and maintenance services for its various facilities. As to the lack of training presumably even compliance officers are aware of the fact that this Respondent is one of the Nation's largest corporations and produces many different product lines. As for the landlord services, it hardly comes as a surprise that the provision of utility and maintenance services for all operating divisions and groups are performed by a separate organization. However, that does not mean that the landlord has responsibility for requiring compliance with safety regulations by the operating divisions. Cf. Buckley & Co., Inc. v. Brennan, 507 F.2d 78 (3d. Cir., 1975).

also those who should have known of and prevented the occurrence of the repeated violation. The keys are prior notice and the authority to correct.

The facts of this case demonstrate the inappropriateness of my colleagues' test. Respondent employs more than 27,000 working people at its Schenectady operation. They are employed by 16 different divisions and over 64 departmental groups. The operations are diverse. For example, the product lines include steam turbines and generators, A.C. motors, microwave tubes, irsulating wire, castings, and gas turbines. In addition research and development laboratories such as the Knowls Atomic Power Laboratory are located at Schenectady. In view of this diversity, large operations such as the steam turbine and generator operation are organized into divisions headed by a vice president-general manager. The One River Road facility includes over 50 buildings located on 130 acres of land. The Nott Street facility is much smaller, but it has at least four or five buildings.[8/] My colleagues' test comes down to this: a prior violation of a standard occurring in, e.g., the Knowls Atomic Power Laboratory is sufficient to make a subsequent violation occurring in, e.g., the insulated wiring division repeated within the meaning of 29 U.S.C. 666(a). The statement of the test demonstrates its absurdity.

Turning now to the specific repeated allegations I note that the evidence does not preponderate in favor of a finding that a person or

---

8/ The Union's safety director testified that Building No. 273 involved herein contained 22 acres of floor space and Building No. 52 is as large as a football field.

persons having authority to prevent repetitions from occurring was ever apprised or should have been apprised of the original citations. There is some evidence tending to show that some of the violative circumstances, both original and recurring, took place within the steam turbine and generator division. Too, there is an indication that the same safety official for Respondent was present at some prior inspections and at the one which gave rise to the repeat allegations. But this is not enough in my view to establish a sufficient nexus to warrant the assessment of penalties of up to $10,000. I therefore dissent from finding Respondent in repeated violation.

Potential Exposure

My colleagues' statement concerning this issue arises in connection with the allegation that Respondent was in willful-serious violation of 29 C.F.R. 1910.23(c)(1) because it failed to provide guardrails on a stator frame and on a powered work platform. They conclude that Respondent was in willful-serious violation as to the work platform. As to the stator frame they find a serious violation because of a genuine conflict between the parties as to whether the standard applies. The administrative judge vacated as to the work platform because the evidence showed that it was not in use at the time of the inspection, and the Secretary failed to show that employees had used it for six

months prior to the inspection.[9/] He also concluded that the cited standard does not apply to the stator frame.[10/] I would affirm his disposition.

In reaching their conclusion regarding the powered work platform my colleagues say that the record demonstrates actual (as opposed to potential) employee exposure to a hazardous condition. Therefore, they say, there is no need in this case to address the problem created by the conflicting court decisions on the exposure issue. Compare: Brennan v. OSHRC (Underhill Const. Co.), Nos. 74-1579, 74-1568 (2d Cir., March 10, 1975); Brennan v. OSHRC (Gillis & Cotting), 504 F.2d 1225 (4th Cir., 1974); Southeast Contractors, Inc., v. OSHRC, No. 74-2698 (5th Cir., March 19, 1975).

My colleagues rely on the Union Safety Director's testimony which they quote at page 37 of their opinion. Three conclusions may be drawn from the quoted testimony: (1) the safety director saw people on the platform; (2) his testimony is without reference to time, thus we do not know when he saw the people on the platform and therefore cannot conclude that his observation is within the period of limitations prescribed by 29 U.S.C. 658(c); and, (3) his testimony does not establish an operating height for the platform whereas the standard only requires guarding above four feet. Clearly, the majority errs in finding any violation much less a willful-serious violation on the Union official's testimony.

9/ He also concluded that the cited standard was inapplicable because the device referred to as a work platform was in fact a scaffold and not within the cited standard. His conclusion was correct for the reasons he assigned.

10/ This issue is dealt with under the subheading "The Stator Frames" infra.

On the other hand, there is other evidence from which we might or might not be able to infer that employees were potentially exposed to an unguarded work platform or scaffold (see note 9). My colleagues err by not resolving the willful-serious citation on this evidence. As for my view, we should adopt a rule that exposure or accessibility may be established by evidence tending to show that an employee's assigned duties either have brought him into the area of risk presented by a hazard or reasonably will bring him into such area of risk. The evidence in this case should be considered in the light of such rule. In any event, the issue must be resolved because it is fundamental to all enforcement activity under the Act.

I turn now to the matter of the stator frames.

The Stator Frames

My colleagues conclude that Respondent violated 29 C.F.R. 1910.23(c)(1) in a serious manner because a stator frame was not provided with guardrails as required by the standard; a drill operator was exposed. They assess $900. They also conclude that 29 C.F.R. 1910.252(e)(1)(i) was violated in a serious manner because two welders were seen working on a stator frame and were not protected from falls by guardrails, tied-off safety belts, or other means. Again they assess $900.[11/] Their findings are predicated solely on their conclusion that stator frames are work platforms within the meaning of 29 C.F.R. 1910.21(a)(4). The administrative judge concluded to the contrary because he was of

---

11/ The assessment appears to be punitive in view of the record. The Union's safety director testified that the hazard has been abated with safety belts.

the view that the stator frame was a "work piece" rather than a platform as the term is used in 1910.252(e)(1)(i) and defined by 1910.21(a)(4).

Insofar as my colleagues would require that guardrails be erected on stator frames I must agree with the judge's rationale. The reason is rather simple. If this Respondent is required to provide standard railings on its product because it is of such size that employees must be on it to manufacture it, then any other employer similarly situated can also be required to erect guardrails on its product while its being manufactured. For example, their rule will require the erection of guardrails on the wings, tail assemblies and fuselages of large aircraft being manufactured. Other equally monstrous modifications of product design can be easily imagined. Nevertheless, this is the result my colleagues achieve by construing the term "platform" to include an item being manufactured so as to bring it within 29 C.F.R. 1910.23(c)(1).

Moreover their construction is unnecessary. The safety hazard involved with the alleged violation of 29 C.F.R. 1910.23 (c)(1) is that the driller was working at a height and not provided with protection against a fall. I can only wonder why the Secretary and my colleagues insist on requiring that guardrails be erected on the stator frames when it appears that Respondent's real failure was in not providing a scaffold for the driller to work from (29 C.F.R.

1910.28(a)(1)). In short, there is a safety practice available which answers the problem I address. However, Respondent was not cited for failing to provide a scaffold for the drill operator and such issue was not tried.

A different situation and standard exists as to the two welders. 29 C.F.R. 1910.252(e)(1)(i) unlike 29 C.F.R. 1910.32(c)(1) allows alternative means for protecting welders from falls. Thus it lists railings, safety belts, or any other effective means. It is true that the standard provides that "A welder or helper working on platforms, scaffolds, or runways shall be protected against falling...", and therefore argueably is not applicable to products being manufactured. But it is also true that the standard can be interpreted so as to effectuate its purpose. Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340 (2d Cir., 1974). This may be done simply by reading the terms "platforms, scaffolds, or runways" by way of example rather than as terms of limitation. When the terms are read in such fashion, the standard can be said to require fall protection for welders working on a product, i.e., it can be read as requiring fall protection on platforms, scaffolds, runways, or products. I would so interpret the standard. The record shows that safety belts could have been used and that the hazard was in fact abated with safety belts. Accordingly, a violation was established as to the welders.

The Eye Protection Issue

Perhaps of all the actions taken by my colleagues in this case their action in finding a repeat violation of 29 C.F.R. 1910.133(a)(1)

and assessing a penalty of $2,000 is the most punitve and the least warranted. The record simply does not support their treatment of this issue. It is uncontroverted that Respondent supplies eye protection, posts eye protective equipment use areas, and mandates that employees use the equipment.

As to Respondent's general program on this issue the following exchange took place between the administrative judge and counsel for the Union:

> The Court: They see the inspector coming, and all they have to do is take their goggles off and they have got a violation.
>
> Mr. Chertkov: At G.E. they are fired. I mean that is a great fear...(Tr. 344-45).

With regard to the specific circumstances alleged as the basis of the repeat violation the Union's safety director testified as follows:

> Q. You didn't observe, at any time, the use of that jack hammer during that inspection; is that correct?
>
> A. No, because after we--we went right on by, after that incident...and I don't know whether the employees went back and used the jack hammer or not.
>
> Q. As you were approaching it, is what I am really talking about.
>
> A. As we were approaching, I was aware that the employees were over in the area.
>
> Q. Is that all?
>
> A. I don't know exactly what job they were doing, and I know that one had a jack hammer in his hand.
>
> Q. You don't know whether the jack hammer was functioning?
>
> A. No, I don't. There are several boring mills running at the same time in that area.

Q. ...Now, it is your testimony, I take it, that it is clearly posted in [Building No.] 273 that safety glasses are to be worn; is that correct?

A. Yes, it is. It is posted on all the doors.

* * * *

Q. This is a fairly rare occurrence, would you say, in 273, to see somebody without safety glasses on?

A. Without safety glasses?

Q. Yes.

A. Yes. (Tr. 453-455).

The witness also testified as follows:

Q. ...would you say that the safety glass rule is generally observed in those two buildings [the buildings inspected]?

A. I would say that the safety glass rule is observed in those buildings.

In view of the foregoing there can be no doubt that even if a violation existed it was a rare and unusual circumstance. Respondent provided glasses; their use was required and enforced. It did all that was possible in the circumstances, and the citation should be vacated. Brennan v. OSHRC (Hendrix d/b/a Alsea Lumber Co.) No. 73-1938 (9th Cir., February 24, 1975).

Moreover, I see no need for the majority to overrule our decision in CAM Industries, Inc., 7 OSAHRC 30, BNA 1 OSHC 1564, CCH E.S.H.G. para. 17,373 (1974). There we said that 29 C.F.R. 1910.133(a)(1) does not impose a requirement that employers are responsible for making their employees use eye protection. If my colleagues fear that a use requirement will not be imposed by the standards absent an overruling of CAM, I would merely point out that the standard is redundant to section 1910.

132. I am aware, of course, that the doctrine of stare decisis is one of policy. Nonetheless, it is poor policy to willy-nilly overturn precedents particularly where there is no need. All that is accomplished by such action is the creation of uncertainty in the minds of those who must obey the law.

Miscellaneous Matters

A. Welding Leads; Tripping Hazard

Respondent was cited for a repeated non-serious violation of the general housekeeping standard (29 C.F.R. 1910.22(a)(1)) because allegedly welding leads created a tripping hazard in Building No. 52. Although my colleagues find that the cited standard does not apply to the circumstances in view of 29 C.F.R. 1910.5 because a more appropriate standard (29 C.F.R. 1910.252(e)(1)(iii)) does apply, they nevertheless affirm the citation.

The administrative judge vacated. He observed that the welding standards recognize that cables must be spread out to avoid overheating and damage to insulation, i.e., the creation of other potentially serious hazards. He also noted that the cited standard is subjective in that it requires places of employment to be "kept clean and orderly and in a sanitary condition." On the evidence of record he determined Respondent had complied. I would defer to his evaluation of the matter.

B. Fixed Ladder With 12" Rungs

It is undisputed that Respondent's ladder was provided with 12 inch

rungs as opposed to 16 inch rungs in violation of the terms of the cited standard (29 C.F.R. 1910.27(b)(1)(iii)). The judge noted that other standards permitted rungs of the size used by Respondent. On review, the Secretary agrees that the violation is de minimis. I would affirm the judge's disposition on that basis.

C. Bent Fixed Ladder

Respondent was cited for violating 29 C.F.R. 1910.27 because allegedly it did not maintain a fixed ladder "in a safe condition." The ladder was supposedly unsafe because the siderails were bent to the left near the bottom. Thus it was said the stability of the ladder was affected. The administrative judge determined as a matter of fact that the distortion was "minimal." He concluded that a violation had not been established; the ladder was safe. I agree.

In affirming my colleagues shift the issue to one that was not pleaded and was not tried. They predicate affirmance on the ground that two rungs were bent, and they conclude that an employee could miss his step. I dissent.

D. Mechanical Handling Equipment; Unmarked Aisles

Respondent was cited for violating 29 C.F.R. 1910.176(a) because permanent aisles and passageways in a furnace and temporary storage room were not appropriately marked. My colleagues affirm but do not mention that Respondent was abating the condition at the time it sup-

posedly violated the standard. The judge vacated, and I would affirm. In this regard I note that the Act contemplates exposure to hazardous conditions for the purpose of eliminating them (29 U.S.C. 662(a)).

Conclusion

For the reasons given I dissent to so much of my colleagues' decision as I have discussed. As to those portions not discussed, I am in agreement with their disposition but not necessarily for their reasons. As should be evident from my discussion, they frequently say one thing but say their action is predicated on another.

Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

GENERAL ELECTRIC COMPANY, :

Petitioner, :

-against- : PETITION FOR REVIEW

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, :

Respondent. :

- X

General Electric Company hereby petitions the Court for review of so much of the Order of the Occupational Safety and Health Review Commission issued on April 21, 1975 in Secretary of Labor v. General Electric Company, OSHRC Docket No. 2739, as (1) held that the Company committed a repeated serious violation of 29 CFR Part 1910.133(c)(1) (protective eye equipment) and, in connection therewith, assessed a penalty of $2,000.00; and (2) further held that the Company committed a willful violation of 29 CFR Part 1910.23(c)(1) (powered work platform) and, in connection therewith, assessed a penalty of $2,000.00.

Dated: New York, New York
June 20, 1975

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN

By Michael I. Bernstein
A Member of the Firm
Attorneys for Defendant
General Electric Company
Office & P. O. Address
469 Fifth Avenue
New York, New York 10017
212-889-1470

and

ROLAND C. RADICE
General Electric Company
1 River Road
Schenectady, New York 12305
518-393-1430

Certificate of Service

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

-against-

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of its Petition For Review has been served this 20th day of June, 1975, by certified mail upon the following, neither of whom is a named respondent herein, at the addresses listed below:

Francis V. LaRuffa
Regional Solicitor
U. S. Dept. of Labor
1515 Broadway, Room 3555
New York, New York 10036

Boren Chertkov, Esq.
I.U.E., Radio & Machine Workers,
AFL-CIO, CLC Local #301
1126 16th Street, N.W.
Washington, D. C. 20036

In addition, the undersigned certifies that a copy of its Petition For Review has been served this 20th day of June, 1975, by certified mail upon the Amicus Curiae below at the following address:

Bertram Robert Cottine & Stephen Early, Repres. of Health Research Group
2000 P Street, N.W. Suite 708
Washington, D. C. 20036

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN

By _____
A Member of the Firm

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 26th day of April 19 76, at 3:00 o'clock P. M. he served the annexed Joint Appendix, in re- General Electric Co. v. Occupational Safety and Health Review Comm.et al.

upon SEE SECOND SHEET

Esq(s)., Attorney(s)

for SEE SECOND SHEET

by depositing 1 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

SEE SECOND SHEET

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 26th day of April 19 76

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978

SECOND SHEET

1. Allen Sachel, Esq.
   U. S. Department of Justice
   Civil Division
   Appellate Section
   10th & Pennsylvania AVe. N. W.
   Washington D. C. 20530

   Attorney for Respondent, Occupational Safety and Health Review Comm.

2. Winn Newman, Esq.
   International Union of Electrical Radio and Machine Workers
   AFL-CIO-CLC- and its Local No.301
   1126 16th St. N. W.
   Washington D.C. 20036

   Attorney for Intervenors

3. William J. Kilberg, Esq.
   Attn: Nancy L. Southard, Esq.
   U. S. Dept. of Labor
   Room S4004
   200 Constitution Ave. NW
   Washington DC 20210

   Attorney for Respondent - Secretary of Labor

Joseph Bosell

Sworn to me this 26th
April 1976
John Alusick
JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 19